

No. 12023

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
HONOLULU PLANTATION COMPANY,
Appellee.
and
HONOLULU PLANTATION COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

(In Four Volumes)

VOLUME II

(Pages 433 to 840)

FILED

DEC 31 1948

PAUL P. O'BRIEN,

CLERK

Appeal from the United States District Court
for the District of Hawaii

No. 12023

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UNITED STATES OF AMERICA,
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Appeal from the United States District Court
for the District of Hawaii

[Title of District Court and Causes.]

ORDER FOR CONSOLIDATION

Upon the motion of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the United States District Court for the District of Hawaii, and good cause appearing therefor,

It Is Hereby Ordered that the seven above entitled proceedings be consolidated into one proceeding insofar as the Honolulu Plantation Company is concerned and insofar as it has any claims for damages or may claim damages by reason of the taking under the said proceedings: and

It Is Hereby Further Ordered that said Honolulu Plantation Company be and it is hereby authorized to filed one answer in the consolidated proceedings and that the trial in said consolidated proceedings be had in the same manner as if all of said takings had been in one proceeding and as if all of the allegations contained in the various petitions filed in the various proceedings had been embodied in one petition.

Dated Honolulu, T. H., this 17th day of February, 1915.

(Seal)

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Feb. 17, 1915.

[768]

[Title of District Court and Causes.]

STIPULATION

It Is Hereby Stipulated by and between the United States of America, Petitioner in the above entitled cases, and Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled cases, by their respective attorneys:

1. That Two Hundred Eighty-five Thousand and 00/100 Dollars (\$285,000.00) is just compensation, inclusive of interest to and including the 18th day of February, 1945, to which the Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled cases, is entitled as just and full compensation for its growing crops and stools, by reason of the condemnation of the properties in each of the proceedings herein and by reason of the destruction of growing crops and stools in and along a certain military road, delineated as Parcel D-15, an area of 16.9368 acres, on 14th Naval District Map OA-N1-942 dated January 5, 1945 attached hereto as Exhibit "A", and delineated as Parcels A, B, C, D, and E, an area of 13.142 acres, on the 14th Naval District Map OA-N1-1223 and attached hereto as Exhibit "B" and for the destruction of growing crops and stools by reason of the construction of a certain fresh water pipe line, the center line of which is shown on 14th Naval District Map OA-N1-912 as portions N-1, T-1, N-2, T-2, N-3, B and E, which map is attached hereto as Exhibit "C"; and that the said

sum of \$285,000.00 shall be in full satisfaction of and just compensation for any and all claims and damages suffered by said [770] defendant, Honolulu Plantation Company, in each of the above styled cases and references, for the taking of its growing crops and stools by the United States of America; said sum shall also be inclusive of any claim said defendant may have or claim to have against the United States of America or any department or agency thereof for compliance payments under the Sugar Control Act for the production of sugar with respect to the unharvested growing crops on the real property first above described, but shall not include the settlement of any other claims for damages.

2. That on the 10th day of February 1945, there was deposited by the petitioner in case Civil No. 514 the sum of \$46,666.10; that on the 10th day of February, 1945, there was deposited in case Civil No. 525 the sum of \$10,655.53; and on the 29th day of January, 1945, there was deposited in case Civil No. 544 the sum of \$66,039.94; as estimated just compensation to the said Honolulu Plantation Company.

3. That said Honolulu Plantation Company is entitled to a judgment against the United States of America for the sum of \$285,000.00, inclusive of Interest to February 18, 1945, and that the entry of said judgment shall be accomplished by entering a judgment in the sum of \$285,000.00, inclusive of interest to February 18, 1945, in each of the said seven cases above as consolidated, and it is agreed

that the Clerk may issue his check to said Honolulu Plantation Company for the sum of \$123,361.57, total amount of the deposits in the cases above mentioned as estimated just compensation to Honolulu Plantation Company and the balance of \$161,638.43 shall be paid by petitioner to the Clerk of this Court.

It Is Further Stipulated and Agreed that an executed copy of this stipulation shall be filed in each of the above entitled cases and the parties hereto consent to the entry by this Court of all orders and decrees necessary and appropriate to effectuate this stipulation and agreement.

Dated Honolulu, T. H., this 17th day of February 1945.

UNITED STATES OF
AMERICA,

Petitioner,

By /s/ CHARLES F. RATHBUN,
Special Assistant to the
Attorney General.

HONOLULU PLANTATION
COMPANY,

By STANLEY, VITOUSEK,
PRATT & WINN,
Its Attorneys,

By /s/ C. DUDLEY PRATT.

In the District Court of the United States
For the District of Hawaii

[Cases Nos. 514, 525, 529, 533, 535, 548.] [771]

JUDGMENT

This case coming on to be heard upon the files and records in the above proceedings and upon the Stipulation dated the 17th day of February, 1945, and executed by and between the United States of America and the Honolulu Plantation Company, a corporation, one of the defendants in the above cause, and filed in this cause as consolidated on the 17th day of February, 1945, and it appearing from the said Stipulation that the sum of \$285,000.00, inclusive of interest to February 18, 1945, is full and just compensation to which said Honolulu Plantation Company is entitled by reason of the taking of the growing crops and stools in said proceedings belonging to or claimed by said Honolulu Plantation Company and by reason of destruction of growing crops and stools in connection with other properties not involved in the condemnation cases above mentioned but which are shown and described in the said Stipulation, and maps attached thereto, and including any claim by said Honolulu Plantation Company against the United States of America or any department or agency thereof for compliance payments under the Sugar Control Act for production of sugar with respect to the unharvested growing crops on the real property above mentioned; but excluding claims of Honolulu Plantation Company for the taking of its im-

provements and for any and all other damages claimed by it; and

It appearing that on the 10th day of February, 1945, there was deposited by the petitioner in case Civil No. 514 the sum of \$46,666.10; that on the 10th day of February, 1945, there was deposited in case Civil No. 525 the sum of \$10,655.53; and on the 29th day of January, 1945, there was deposited in case Civil No. 544 the sum of \$66,033.94; as estimated just compensation to the said Honolulu Plantation Company; and [772]

It appearing that said Honolulu Plantation Company is entitled to a judgment, subject to the above inclusions and exclusions, against the United States of America for the sum of \$285,000.00, which sum includes interest to February 17, 1945:

Now Therefore, on motion of the Honolulu Plantation Company and of the United States of America, It Is Ordered that the Clerk be and he is hereby directed, pursuant to the terms of said Stipulation, to enter a judgment against the United States of America, petitioner, in the above causes as consolidated, fixing the amount of the compensation and damages, present and future, to its growing crops and stools by reason of the condemnations and takings aforesaid at the sum of \$285,000.00, and that the said Honolulu Plantation Company do have and recover of the United States of America in cases Civil 514, 525, 529, 533, 535, 544 and 548, as consolidated, in the sum of \$285,000.00, including interest to February 18, 1945, and that the said judgment in each of said cases will be

satisfied by the issuance by the Clerk of this Court of his check in the sum of \$123,361.57, payable to said Honolulu Plantation Company and by the payment on or before February 18, 1945 of the sum of \$161,638.43 to the Clerk of this Court, which last sum named shall be paid by the Clerk of this Court to said Honolulu Plantation Company after it is so deposited, and upon the payment of said sums by the Clerk of this Court on or before February 18, 1945, the said judgment so entered in each of said seven cases as consolidated, shall be satisfied in each of said cases as herein limited, and a receipt and satisfaction shall be filed with the Clerk of said Court covering any and all claims for compensation and damages on account of the growing crops and stools taken or destroyed in connection with the properties referred to in the Stipulation on file herein and shown on Exhibits "A" "B" and "C" attached thereto leaving the issues [773] with respect to the damages claimed by the defendant Honolulu Plantation Company covering its improvements taken and other damages claimed by it open for further disposition.

Dated Honolulu, T. H., this 17th day of February, 1945.

(Seal) /s/ WM. F. THOMPSON, JR.,

Clerk of the Above Entitled Court.

Let the foregoing Judgment be entered:

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Feb. 17, 1945.

[774]

[Title of District Court and Causes.]

SATISFACTION OF JUDGMENT

To the Clerk of the Above Entitled Court:

The judgment entered in this cause awarding just compensation in the sum of Two Hundred Eighty-five Thousand and 00/100 Dollars (\$285,000.00), which includes interest computed to February 18, 1945, to Honolulu Plantation Company for the taking by petitioners of growing crops and stools taken or destroyed in the above mentioned proceedings and in connection with other properties not involved in said condemnation cases but shown and described in the stipulation filed in said matter and the maps attached thereto but excluding all other claims for damages, has been fully satisfied and discharged and the Clerk of this Court is authorized and directed to satisfy the same of record.

Dated Honolulu, T. H., this 19th day of February, 1945.

HONOLULU PLANTATION
COMPANY,

By /s/ S. L. AUSTIN,
Its Attorney-in-Fact.

[Endorsed]: Filed Feb. 19, 1945.

[776]

In the District Court of the United States
for the District of Hawaii

- No. 514—United States of America, Petitioner, vs. 257.654 Acres of land, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 521—United States of America, Petitioner, vs. 49.058 Acres of land, more or less, McGrew Point, Kalanao, Ewa, Oahu, Hawaii, and Katherine McGrew Cooper, et al., Defendants.
- No. 525—United States of America, Petitioner, vs. 216.124 Acres of land, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.
- No. 527—United States of America, Petitioner, vs. 93.355 Acres of land, more or less, in Moanalua, Honolulu, Oahu, Hawaii, et al., Defendants.
- No. 529—United States of America, Petitioner, vs. 344.893 Acres of land, more or less, at Manana and Waiawa, Ewa, Oahu, Defendants.
- No. 532—United States of America, Petitioner, vs. 8.279 Acres of land, more or less, at Halawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 533—United States of America, Petitioner, vs. 218.349 Acres of land, more or less, at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 535—United States of America, Petitioner, vs. 145.848 Acres of land, more or less, situate at Halawa and Aiea, Ewa, Island of Oahu, Territory of Hawaii, et al., Defendants.
- No. 536—United States of America, Petitioner, vs. 26.222 Acres of land, more or less, situate at Waiawa, Waimalu, Ewa, Island of Oahu, Territory of Hawaii, et al., Defendants.
- No. 540—United States of America, Petitioner, vs. 124.914 Acres

of land, more or less, situate at Haiku Valley, Heeia, Koolau-poko, Oahu, Territory of Hawaii, et al., Defendants.

No. 544—United States of America, Petitioner, vs. 317.705 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.

No. 548—United States of America, Petitioner, vs. 63.725 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.

No. 684—United States of America, Petitioner, vs. 29.891 Acres of land, more or less, in Moanalua and Halawa, Ewa, Oahu, Territory of Hawaii, et al., Defendants.

MOTION FOR CONSOLIDATION

Comes now Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the said United States District Court for the District of Hawaii, by Vitousek, Pratt and Winn, its attorneys, and moves the Honorable Court that the six above entitled proceedings Numbered 521, 527, 532, 536, 540, and 684 and the consolidated proceedings (being the consolidation of Civil Cases Numbers 514, 525, 529, 533, 535, 544, and 548) be consolidated into one proceeding insofar as this movant is concerned and insofar as it has any claim for damages or may claim damages by reason of the taking under the above entitled proceedings; and that the trial in said consolidated proceedings be had in the same manner as if all of said takings had [782] been in one proceeding and as if all of the allegations contained in the various petitions

filed in said proceedings had been embodied in one petition.

This motion is based upon all of the pleadings in the above entitled proceedings and upon the affidavit of S. L. Austin hereto attached.

Dated Honolulu, T. H., this 9th day of October, 1946.

HONOLULU PLANTATION
COMPANY,

By VITOUSEK, PRATT & WINN,
Its Attorneys.

By /s/ R. A. VITOUSEK. [783]

AFFIDAVIT FOR CONSOLIDATION
OF ACTIONS

District of Hawaii,
City and County of Honolulu—ss.

S. L. Austin, being duly sworn, says that he is the attorney-in-fact of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled actions which are pending in the United States District Court for the District of Hawaii as aforesaid; that each of said actions is a proceeding in eminent domain by the United States of America to obtain for governmental use lands held under lease or in fee by the said Honolulu Plantation Company; that the Honolulu Plantation Company owns and operates and at the time each of said actions was filed, owned and operated a sugar plantation on the Island of Oahu,

Territory of Hawaii, in the vicinity of Pear Harbor; that the lands held and operated by it were contiguous; that said lands acquired by the United States in said actions all formed an integral part of the properties that were being so held, used and operated by the said Honolulu Plantation Company as a unit in the conduct by it of said sugar plantation;

That there has been taken from the operating properties of the said Company 1079.66 acres of cane land (together with certain improvements) by reason of said above entitled actions, leaving for operation 3309.25 acres of cane land (both fee and leasehold) and a sugar mill, camps, pumps, irrigation systems and other properties that formed a part of said sugar plantation enterprise;

That upon the 17th day of February, 1945, by order of this Court, the above-named actions numbered respectively Nos. [784] 514, 525, 529, 533, 535, 544 and 548 were consolidated into one proceeding insofar as the Honolulu Plantation Company was concerned and insofar as it has any claims for damages or may claim damages by reason of the taking under the said proceedings;

That the said Honolulu Plantation Company intends no defense to the institution as such of the above entitled actions; that the sole matters for consideration and at issue are the determination of the parties entitled to compensation and their respective interests in the property involved, the amounts to be paid therefor, and the just compensation that is due the said parties because of such

taking and the Company is claiming no damages except against the United States;

That the separate trial of the consolidated action and of the remaining six (6) actions, making in all seven (7) actions to be tried, will subject said Honolulu Plantation Company to unnecessary costs, expenses and delays;

That the Honolulu Plantation Company claims compensation for specific improvements, for pre-paid rental, for fee simple land and for other specific property taken and in addition it claims damages for depreciation in market value of the physical properties of the Company remaining after the taking of the properties being condemned in the said above entitled actions;

That the consolidation of the said actions will render unnecessary the duplication of proof with respect to the enterprise of said Honolulu Plantation Company and the properties used by it in conducting the same, the effect of removing the property being condemned therefrom and numerous other points with respect to title, occupancy, use and numerous factors affecting value and damages suffered, and further that the [785] damages suffered by this defendant by reason of the taking of property by means of said proceedings is directly affected by the aggregate of the amount of property taken by condemnation; that said property condemned is merged in all of said Company's sugar producing property as one "unity in use", operated together and that the severance or taking away

of the condemned property will result in substantial damages to the physical properties of this defendant remaining after the taking of the properties involved in said actions, difficult if not impossible of full and adequate proof in seven (7) separate proceedings; that the damages to be claimed by said Company by reason of said taking would require the same amount of proof in each of the seven (7) proceedings if tried separately and would require little, if any, more evidence in a consolidated action than would be required in each of said actions if tried separately; that the amount of land to be taken in the aggregate by reason of said actions is very substantial and the proof of the damages that will be suffered by this defendant can more clearly and readily be shown in one consolidated proceeding than could be shown in each of the actions separately, and this is particularly true of the actions where the area involved is relatively small in comparison to the total area held and operated by said Company; that the said Company will be unable to properly present the question of damages if such actions are not consolidated and would thereby be deprived of substantial right; that requiring said Company to try each of said takings separately would subject it to such excessive expense and loss of damages suffered as to constitute a deprivation of property without due process of law and a taking for public [786] use without just compensation in violation of the Fifth Amendment of the Constitution of the United States;

That the practice of leasing lands instead of owning them and of building up enterprises with leased lands for the purpose of raising sugar cane was the prevailing practice in all of the Hawaiian Islands, particularly on the Island of Oahu, both at the time of the filing of each of the above entitled actions and at all times prior thereto since the year 1851; that there is not land available to Honolulu Plantation either through purchase or lease suitable for sugar cane raising purposes to replace the land taken in the above entitled actions; that because of the well established business practices prevailing in the Hawaiian Islands and particularly on the Island of Oahu said Honolulu Plantation could and did feel assured, and had every reason to so do, that its leases of cane lands would be renewed on reasonable terms on the respective expiration dates;

That the filing of the separate actions above mentioned amounts to chopping the interests of Honolulu Plantation Company into bits and such actions become instruments of confiscation and not the means of obtaining just compensation for what is being taken and just compensation for the damages caused to the remainder of the property of said Company by reason of the taking;

That the Company presented a claim bill to the United States Congress asking for damages to its real property, mill, water systems, remaining leaseholds, and other enterprise properties not expropriated by the United States for the depreciation in

the market value thereof arising out of the takings under various condemnation actions both in the above captioned cases and in others previously brought; that the bill was presented because of the consistent contentions of the government that such [787] loss could not be recovered in condemnation suits;

That such bill passed the House of Representatives authorizing the Court of Claims to adjudicate the same and while said bill was pending in the Senate, the Attorney General wrote a letter opposing it on several grounds, one of which being that the question was posed to this court in these actions and had not been determined; an exact copy of said letter is hereto attached as Exhibit "A" and is hereby made a part of this affidavit;

That it is not clearly apparent from said letter whether or not the Attorney General of the United States now admits that such damages can legally be awarded said Company;

That if the United States admits that said Company is legally entitled to recover by way of damages the loss in the market value of its physical properties remaining after the taking, occasioned by the taking, such loss can only be fairly and justly ascertained by consolidating all of the said actions and having one trial of said consolidated actions; if the United States denies that this Company is legally entitled to recover such damages, such defense can as readily be interposed and can certainly more expeditiously be interposed in a trial

of said actions consolidated into one proceeding than it could in a separate trial of said actions.

Further affiant sayeth not.

/s/ S. L. AUSTIN.

Subscribed and sworn to before me this 7th day of October, 1946.

(Seal) /s/ LILLIAN H. MARKHAM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires June 30, 1949. [788]

EXHIBIT "A"

Honorable Allen J. Ellender July 22, 1946
Chairman, Committee on Claims
United States Senate
Washington, D. C.

My dear Senator:

I invite your attention to the bill (H. R. 2688) to confer jurisdiction upon the United States Court of Claims to hear, determine and render judgment upon the claim of the Honolulu Plantation Company. This bill, prior to its amendment within the House Committee on Claims provided for an appropriation of \$3,250,000 for alleged damages sustained by the company.

At the request of the Chairman of the House Committee on Claims, this Department made a report on the original draft of the bill. The character of the bill has been fundamentally changed as a result of the amendments made in the House.

As so amended it would confer jurisdiction upon the Court of Claims, "notwithstanding any prior determination, statute or decision, to hear, determine, and render judgment upon the claim of the Honolulu Plantation Company, a California corporation, for damages to its real property, mill, water system, remaining leasehold and other enterprise properties not expropriated by the United States Government, and located on the Island of Oahu, in the Territory of Hawaii, for the depreciation in the market value thereof arising out of expropriations by the United States of divers land upon which said claimant held leases, in proceedings wherein said lands were condemned in the United States District Court in and for the Territory of Hawaii, and designated as civil numbered 416, 430, 434, 436, 442, 452, 514, 525, 529, 533, 535, 544, and 548."

The condemnation proceedings referred to in the bill were instituted beginning in the case of civil numbered 416 on October 30, 1939. The case numbered 548 is the one last filed and that occurred on January 20, 1945. As to six of the cases, namely Nos. 416, 430, 434, 436, 442 and 452, I find that a stipulation with the attorneys for the Honolulu Plantation Company was entered into and filed in the office of the clerk of the court on January 8, 1943. This stipulation contains the following: "That \$239,413.58 is just compensation (exclusive of interest) to which Honolulu Plantation Company, one of the respondents and/or defendants in each and all of the above entitled cases, is entitled by reason

of the condemnation in said proceedings of any properties belonging to or claimed by said Honolulu Plantation Company, or any interest it may have in the properties condemned in said proceedings, and on account of any damages, present and future, suffered by it by reason of said condemnation proceedings, including, without limitation as to the generality of the foregoing, severance damage, value of crops, claims for compliance payments, and any other claims it had or may have against the United States of America, or any department or agency thereof, by reason of said condemnation proceedings, * * *."

In view of this stipulation it would seem that at least with respect to the six cases covered by it the Honolulu Plantation Company has had its day in court and has agreed that it has received full compensation "on account of any damages, present and future, suffered by it by reason of said condemnation proceedings, including, without limitation as to the generality of the foregoing, severance damage, value of crops, claims for compliance payments, and any other claims it had or may have against the United States of America, or any Department or agency thereof, by reason of said condemnation proceedings".

With respect to the seven remaining cases specified in the bill, I find that an answer was filed in the office of the clerk of the court on February 17, 1945. This answer claims compensation not only for the value of the interests asserted by the Company in the particular parcels involved, but it in-

cludes a claim for "a special and enhanced value" of these interests "by reason of the establishment by this defendant of a sugar mill and works in close proximity to said lands, for the manufacture of sugar cane grown and cultivated thereon and on other lands owned and/or leased by this defendant and by reason of the development by this [790] defendant of a water supply for the irrigation of said lands and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise". The answer also alleges with respect to these particular parcels of land that they were for many years prior to the filing of the condemnation proceedings "occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it, * * * and in connection with other large and contiguous tracts situated outside of the lands described." The allegation is also made in the answer that "the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and assets of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished." The answer contains a prayer for damages with respect to the taking of the particular parcels and "for such other and general relief as may be meet and proper in the premises".

On February 17, 1945, a stipulation signed by the attorneys for the Honolulu Plantation Company was filed with the clerk of the court covering the seven cases in question. It was agreed in this stipulation that the sum of \$285,000 constituted

“just and full compensation” for growing crops and stools, and that the sum of \$285,000 “shall be in full satisfaction of and just compensation for any and all claims and damages * * * in each of the above styled cases of reference, for the taking of its growing crops and stools by the United States of America”. It is, however, provided in this stipulation that this sum “shall not include the settlement of any other claims for damages”. It would seem to follow that the claims for damages with respect to the entire properties of the Honolulu Plantation Company which are covered in the answer filed with respect to these seven cases is still pending in the court, as the stipulation by its very terms does not cover that part of the claim asserted in the answer. As a matter of fact in the condemnation proceedings in the United States District Court before Judge McLaughlin on May 10, 1946, the seven cases in question were set down for trial in that court on October 7, 1946. [791]

An analysis of the thirteen cases specified in the bill thus discloses that the United States District Court for the District of Hawaii has already fully disposed of the claims of the company with respect to six of the parcels and that its claims are still pending there for determination as to the other seven parcels. It would seem to follow that there is no justification for referring those same claims to another tribunal for adjudication. Indeed, if the bill should be enacted it is possible that there might be pending at the same time a part of the claim both in the United States District Court for the

District of Hawaii and the Court of Claims. Furthermore, in view of the words "notwithstanding any prior determination, statute or decision" contained in lines 15 and 16, page 2 of the bill, possibly the company would be entitled to sue in the Court of Claims with respect to the claims previously adjudicated in their entirety in the six cases mentioned above.

It is to be noted that the bill provides that the damages to be ascertained and adjudged shall be the difference in the fair market value of the fee lands of the mill and other enterprise properties of the claimant as the same existed in 1936 prior to the filing of the condemnation suits and as the same remained in 1945 after the severance and loss of the beneficial use of the lands condemned by the United States. Since the first of the condemnation suits specified in the bill was filed in October 1939 there would seem to be no justification for selecting the year 1936 as the one from which the comparison is to be made as to the value of the company's properties in relation to their value in 1945. However, a much more serious objection to this language is that it may be interpreted to set forth a measure of damages, leaving to the Court of Claims only the computation of the amount of the recovery.

The bill further provides that all testimony adduced before and all documents and evidence received by the subcommittee of the Committee on Claims of the House of Representatives shall be competent evidence of damages sustained as fully

and to the same extent as though the witnesses were present and without further proof and certification. The justification for such a provision is not apparent, for the [792] Court of Claims ought to be permitted to determine, according to the principles of law and the established rules of evidence, if the evidence received by the subcommittee is competent and whether there exists an obligation on the part of the Government to compensate the Honolulu Plantation Company for damages suffered. Certainly fairness and justice require that both parties present and the Court receive their evidence according to the same rules. The Government should not be denied the right to confront and cross-examine the claimant's witnesses and to object to the introduction of improper evidence.

For the foregoing reasons I am unable to recommend the enactment of the bill.

I have been advised by the Director of the Bureau of the Budget that there is no objection to the submission of this report.

With kind, personal regards,

Sincerely yours,

/s/ TOM C. CLARKE,
Attorney General.

[Endersd]: Filed Oct. 9, 1946.

[793]

[Title of District Court and Causes.]

MOTION FOR BILL OF PARTICULARS

Comes now the United States of America, petitioner herein, in each of the foregoing causes and moves for the particulars of the claim or claims of Honolulu Plantation Company as set forth in the various answers filed herein by said Honolulu Plantation Company, with particular reference to the following:

1. Which property condemned in these proceedings is owned by Honolulu Plantation Company in fee simple;

2. Upon which of said properties so condemned is Honolulu Plantation Company the owner of a leasehold interest, giving full particulars as to said leases, if any;

3. A detailed list and location of any improvements existing on the property condemned and whether or not such improvements were removed and returned to said Honolulu Plantation Company by the United States of America or any of the agencies thereof;

4. A list of the improvements placed upon the premises allegedly occupied by the Honolulu Plantation Company as lessee and whether or not said improvements became the property of the lessor upon termination of the lease by virtue of the provisions thereof; [797]

5. The precise nature and extent of the claim

of Honolulu Plantation Company which forms the basis of the claim made in the answer filed by said company stating "that by the taking of said lands described in the said petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous takings of land will be greatly impaired and diminished".

And the petition, of the United States of America, further says, in connection with the application to this Court for a Bill of Particulars as aforesaid, that it is unable to properly and accurately prepare its case for trial without the information aforementioned.

Dated Honolulu, T. H., this 6th day of November, 1946.

UNITED STATES
OF AMERICA,
Petitioner herein,

By /s/ CHARLES F. RATHBUN,
Special Asst. to the Atty. Gen.

By /s/ WILMER H. DRIVER,
Special Asst. to the Atty. Gen.

I hereby certify that I have read the foregoing motion for a Bill of Particulars, and further certify that, in my opinion, it is necessary that said motion be complied with in order for the United States to properly prepare its case for trial, and

I do further certify that this motion for Bill of Particulars is not taken for purpose of delay.

By /s/ CHARLES F. RATHBUN,
Special Asst. to the Atty. Gen.

Service of copy admitted this 6th day of November, 1946.

R. A. VITOUSEK,

By YOLANDA HOLCK,
VITOUSEK, PRATT & WINN,
Attorneys for Honolulu Plantation Company.

[Endorsed]: Filed Nov. 6, 1946.

[798]

FROM THE MINUTES OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF HAWAII

Thursday, November 14, 1946

[Title of Court and Causes.]

On this day came Mr. Wilmer H. Driver, Special Assistant to the Attorney General of the United States, and also came Mr. Roy A. Vitousek of the firm Vitousek, Pratt and Winn, counsel for the Honolulu Plantation Company, a defendant herein. These cases were called for hearing on motion for consolidation.

There being no objections by Mr. Driver, the Court granted said motion for consolidation. [799]

FROM THE MINUTES OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF HAWAII

Tuesday, November 26, 1946

[Title of Court and Causes.]

On this day came Mr. Charles F. Rathbun and Mr. Wilmer F. Driver, Special Assistants to the Attorney General of the United States, and also came Mr. Roy A. Vitousek of the firm Vitousek, Pratt and Winn, counsel for the defendant herein, Honolulu Plantation Company, Limited. These cases were called for hearing on motion for bill of particulars, requested by the government.

Following argument by respective counsel, said motion was denied by the Court, and exceptions were allowed the petitioner.

Trial by jury was waived by respective counsel.

[800]

[Title of Court and Causes.]

ORDER FOR CONSOLIDATION

Upon the Motion of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the United States District Court for the District of Hawaii, and good cause appearing therefor,

It Is Hereby Ordered that the six above entitled proceedings Numbered 521, 527, 532, 536, 540, and 684 and the consolidated proceedings (being the

consolidation of Civil Cases Numbers 514, 525, 529, 533, 535, 544 and 548) be consolidated into one proceeding in so far as the Honolulu Plantation Company is concerned and in so far as it has any claims for damages or may claim damages by reason of the taking under the said proceedings; and

It Is Hereby Further Ordered that the trial in said consolidated proceedings be had in the same manner as if all of said takings had been in one proceedings and as if all of the allegations contained in the various petitions filed in the various proceedings had been embodied in one petition.

Dated Honolulu, T. H., this 22nd day of November, 1946.

(Seal)

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Nov. 22, 1946.

[504]

[Title of District Court and Causes.]

J. Frank McLaughlin, Judge

Attorneys for Petitioner: Charles F. Rathbun, Esq., Special Assistant to the Attorney General; Wilmer H. Driver, Esq., Special Assistant to the Attorney General.

Attorneys for Defendant, Honolulu Plantation Company: Stanley, Vitousek, Pratt & Winn, Alexander & Baldwin Bldg., Honolulu, T. H. [80c.]

DECISION

Prior to the institution by the United States, in exercise of its eminent domain powers, of these consolidated thirteen condemnation cases, the Honolulu Plantation Company operated adjacent to Pearl Harbor, upon the Island of Oahu, and irrigated 4,397.34-acre sugar plantation and also a refinery. Since its inception in 1899 this California corporation has conducted its business upon leased land, except for scattered parcels which by good fortune from time to time it has been able to buy in fee. Leasehold plantations, incidentally, are the rule rather than the exception in Hawaii, for usable land in Hawaii is scarce and tightly held by a comparatively few large corporation, trust, and estate owners who buy but rarely sell. As illustrative, in 1945 of the 386,560 acres comprising the Island of Oahu 61.04% of all the land was owned by twenty-eight owners, of whom but one was an

individual. Governmental agencies owned 25.53% of the land, leaving but 12.33% as owned by all others—the bulk of Oahu's population of 348,045 (July 1, 1945). See Exhibit No. 14.

As a result of these thirteen takings in connection with the expansion of the Naval base known as Pearl Harbor—all of which takings under the stipulation of consolidation were agreed to be as of June 21, 1944—the Honolulu Plantation Company was reduced in size from a 4,397.34-acre enterprise to a 3,309.75-acre plantation, or put in terms of tons of raw sugar, from a 21,000-ton plantation to a 15,000-ton plantation. [810]

Arising out of the 1,364.35-acre takings by the Government in these cases, of which 1,087.59 acres were cane land—crop damage having been settled, the Honolulu Plantation Company claims here just compensation for:

1. The taking of certain fee simple land and the improvements thereon owned by it;
2. The taking of certain improvements upon land which it held under lease;
3. Rent prepaid under a lease; and
4. Severance damage.

The jury-waived trial of these issues was of considerable length (December 2, 1946, to January 15, 1947, inclusive of recesses for holidays and the illness of defendant's chief attorney, of which after the trial he suddenly died), and the final brief was filed herein June 5, 1947.

The questions will be resolved in the order above stated, a sequence which reserves to the last the

principal issue between the parties, which happens also to have been an issue considered by the Committee on Claims of the House of Representatives, 79th Congress, 1st Session, Report No. 1313 dated November 28, 1945. H. R. 2688 passed the House, but not the Senate.

I.

What was the fair market value on June 21, 1944, of lands and improvements owned in fee by the Honolulu Plantation Company?

The evidence given by the witnesses may be summarized as follows: [811]

Civil No.	Parcel No.	Government	Defendant
521	2A	\$100	\$470
	A long narrow parcel 35 feet wide and 600 feet long, .47 acre, of which .107 acre is dry, .273 acre swampy, and .18 acre wet but suitable for certain agriculture. A Hawaiian kuleana, that is, a small homestead area owned in fee inside the boundaries of land owned by another and possessing a limited easement of access, not merchantable as lots served by roads.	(Child: Based upon \$700 an acre for dry land; \$400 an acre for wet land; \$50 an acre for swamp land.)	(Ewart: Based upon \$1000 an acre.) \$500 (Moses: Based upon estimated of worth to surrounding owner.)
	2B	\$75	\$535 (Ewart) \$500 (Moses)
	A small kuleana. .107 acre. Square shape.	(Child)	
529	F-1	\$3,500	\$462
	A kuleana. .77 acre. Site of Honolulu Plantation abandoned Pumping Station, improved by a pump house, a small dwelling, miscellaneous storage sheds, and four artesian wells; (1)	(Child: Land, plus all improvements, best use as homesites. Wells, overimprovement, valued at \$10; pump house 58% good at \$2,500; dwelling 32% good at \$768; sheds at \$100.)	(Ewart: Land only at \$600 per acre.) \$500 (Moses: Land only.)

175 feet deep; (2) 180 feet deep; (3) 176 feet deep; (4) 176 feet deep, connected to pump station, pump removed.

F-2

.757 acre. Also a kuleana, by stream, no improvements.

535

2.732 acres

In Plantation village of Aiea, 238-foot frontage on main highway; also road along one side; near school, church, and shops. Highest and best use agreed to be for residence purposes; 7 miles from Honolulu; 700 feet to Aiea center.

\$24,500

(Austin: Value of wells and pump station 80% good, replacement cost less depreciation \$23,000 plus \$1,500 for dwelling, sheds, etc.)

\$400

(Child: At \$1000 an acre and at \$250 an acre along stream.)

\$514

(Ewart: At \$600 an acre.)

\$500 (Moses)

\$14,100

(Child: Based on comparable sales. Gave 25 cents a square foot on main highway; 20 cents a square foot along road; 15 cents a square foot inside lots; over-all 16.9 cents a square foot, minus subdivision costs of 5% and profit 25%.)

\$17,850

(Moses: Based upon comparable sales, applied in general.)

In Civil No. 521 I find the fair market value of parcel 2-A to be \$100 and of parcel 2-B to be \$75.

From these two findings it is obvious that as to their market value I have adopted the opinion of John Francis Child, Jr., local appraiser. I have done so because I have been impressed with his careful analysis of the factors involved and the reasons given by him for his opinion. On the contrary, George Robert Ewart III, manager of the land department of the Company's agent, C. Brewer & Company, Ltd., based his judgment upon a base of \$1,000 an acre, and A. L. Moses, local appraiser, upon his opinion of the two kuleanas' worth to surrounding owners. It seems to be that Mr. Ewart, a plantation man so to speak, was thinking in terms of the commonly referred to \$1,000-an-acre rule as to sugar-cane lands. In any event, due to the size, shape, and condition of these kuleanas even Mr. Ewart would, I am sure, concede that the land is not all usable farm land. Mr. Moses, experienced as he is, seemed to place his weight upon the nuisance value which a kuleana might have to the one who owns the land surrounding it. Such does not reflect market value.

In Civil No. 529 as to both parcel F-1 and parcel F-2. I disregard Mr. Moses' opinion as being based upon the nuisance value to the owners whose land surrounds the two kuleanas.

And as to the land, here again Mr. Child's approach and reasoning is to my mind a better reflection of market value than Mr. Ewart's. Here, in-

deed, Mr. Child is higher than Mr. Ewart, for he used a \$1,000-an-Acre base adjusted for size, while Mr. Ewart used a base of \$600 [813] an acre. Both men agreed that these kuleanas would be best used, as was their original purpose, as homesites, and Mr. Child pointed out that due to size they would be uneconomic as farm sites and based his opinion upon a sale of a larger area across the stream from parcel F-2, an instance of 9.916 acres selling for \$1,347 an acre.

So as to parcel F-2, I find the value to be \$75.

The crucial point as to parcel F-1 relates to the four wells and pump house. Here the question is: Though the value of the improvements must be stated separately under the Hawaiian statute (Section 314, Revised Laws of Hawaii 1945), to what extent, if any, did the buildings and the wells enhance the value of the land?

On this point defendant produced H. A. R. Austin, a civil engineer, who testified that:

1. Though the defendant's books revealed a theoretical depreciation of 2 percent, or 68 percent good, the 4 sixteen-year-old encased artesian wells were actually 80 percent good, for all that was needed to operate them was pipe, fittings, and an adequate pump—if in 1944 such things could be purchased—and the pumping station could be put into operation in about two months, as against six months to dig and equip new wells. Re-equipped these wells would supply many millions of gallons of fresh water daily.

As before noted, the Honolulu Plantation Com-

pany had removed its pump for use elsewhere, as it obtained used water cheaper from the nearby Hawaiian Electric Company power station—water which the Electric Company had first used for cooling purposes.

Mr. Austin figured the replacement cost of the pumping station and wells to be \$27,916.72, and that hence the current value of these things was \$23,000 [814] upon a basis of 80 percent good.

Mr. Austin said his figure represented the extent to which the pumping plant enhanced the land's value, and that he considered the demand for water by the City, the Navy, and others and general conditions at the time (June 1944). He agreed that very little of the water available would be needed in the .77 acre in parcel F-1, so he visualized use or sale of the water off the parcel.

2. As to his \$23,000 figure, Mr. Austin added as a rough guess \$1,500 for the house and sheds adjacent to the pump house—a frame, single-wall, two-story, plantation-type house with a corrugated iron roof—and thus obtained his figure of \$24,500.

3. He conceded that the land surrounding parcel F-1 was not owned by defendant and that a buyer would have to obtain easements for a pipeline to get water off parcel F-1 for use elsewhere or for sale.

4. Though he had not reflected upon it previously, the wells and pump house would have a salvage value of \$1,000.

Contrasted with the civil engineer's approach is that of Mr. Child, who stated:

(a) 'The pump house, excluding a pump, had a replacement value of \$4,320 and was 58 percent good, or had a value of about \$2,500;

(b) 'The frame house (480 sq. ft.) had a replacement value of \$2,400 and was 32 percent good in June 1944, or had a value of \$768;

(c) 'To the sheds he gave a nominal value of \$100; and

(d) 'To the four wells he gave a figure of \$10, for [815] he claimed them to be an overimprovement for the .77 acre which was best used as a homesite. Mr. Child noted, of course, the fact that as the land was surrounded by land of others, it would not be possible to take the water off parcel F-1 without easements, so he considered it only as an independent kuleana.

There is a degree of soundness to Mr. Child's position insofar as the kuleana itself is concerned, for indeed it could never use all of the water that could be developed thereon. And it is true also that the problem is not the special value which this lot with its water might have to the Honolulu Plantation Company, which, by the way, the evidence showed is now very little as the wells have been abandoned in favor of a cheaper source and hence are now but a potential standby source of water.

On the other hand, it is common knowledge that here in the middle of the Pacific not only is fresh water always relatively scarce, but particularly at the date of taking was it so. The Island's population had more than doubled due to the war, and the Navy needed more fresh water constantly for

its ships. I am thus inclined to accept Mr. Austin's statement that in view of the demand for water by the Board of Water Supply of the City and County of Honolulu, the nearby Pearl City water system (suburban), and the Navy and the condition of the times—war conditions, a prospective buyer would consider as enhancing the value of the kuleana the fact that an abundant supply of fresh water could be developed upon the land from the existing wells by the installation of a [816] few new pipes and a good pump. The Government stresses the lack of availability to civilians of such things as pipes and pumps in June 1944. But even if it is not required to assume a normal state of affairs in fixing market value, still it is reasonable to assume for such a vital commodity as fresh water for purposes of human consumption or agricultural use that at that time appropriate priorities to obtain the needed equipment could readily be obtained by a buyer.

And if in the *McCandless* case, 298 U. S. 342 (1936), it was error for this Court to refuse an offer to prove that water could be developed elsewhere and transported miles over land owned by others to make the subject land sugar-cane land, here in the reverse it would seem also to be in order to assume that a buyer could at a reasonable cost obtain the necessary pipeline easement to get the water off the land in order to use it elsewhere or sell it.

Thus I find the market value of parcel F-1 in Civil No. 529 to be \$24,638, representing:

The land alone	\$ 770	(Child's basis of \$1,000 an acre, .77 acre.)
The degree to which the pump house and four wells enhanced its value	\$23,000	(Austin)
The frame house.....	768	(Child)
The sheds	100	(Child)
<hr/>		
\$24,638		

In Civil No. 535 Mr. Moses and Mr. Child agreed as to the description of the land and in general relied [817] upon comparable data. But here again I accept Mr. Child's opinion, for it seems to me his concrete application of the comparable data to the subject property is more helpful and exact than Mr. Moses' general conclusion from like but unapplied data that he gave the parcel an over-all value of 15 cents a square foot.

Thus I find the market value of the 2.732 acres in Civil No. 535 to be \$14,100.

II.

Is the Honolulu Plantation Company entitled to compensation for a concrete supply ditch constructed upon land leased by it from (1) the Bishop Estate and (2) the Oahu Railway and Land Company?

The state of the evidence is as follows:

1. The ditch, though partly on the land of two fee owners, is a continuous one. It is a 2 by 1.8 foot concrete supply ditch, and has headwalls, culverts, and openings and where it passes under a road siphon boxes also made of concrete. From this ditch water brought to it by pumps is taken

off as needed into irrigation ditches to water the sugar cane.

2. Two thousand five hundred sixty-five (2,565) feet of the ditch, built in 1937, are on land leased from the Bishop Estate.

3. One thousand nine hundred forty-five (1,945) feet of it, built at the same time, are on land leased from the Oahu Railway and Land Company.

4. Neither it nor any of its parts are removable, except as useless concrete rubble. [818]

5. Mr. Child considered it as a good immovable improvement of the fee but as having no value apart therefrom.

6. Mr. Austin, who designed and laid out the ditch, in reliance upon provisions in the two leases which will be mentioned, stated upon a replacement cost less depreciation the part of the ditch on Oahu Railway and Land Company land enhanced the fee by \$7,725 and the part of the ditch on Bishop Estate land enhanced the fee by \$11,750.

By assuming that each lease would run until its specified expiration date, he depreciated the value of the ditch to the end of the lease to determine the present value of the lessor's interest, which he deducted in each case from the above figure, and thus stated that \$6,185 represented the value of the lessee's interest in the ditch on Oahu Railway and Land Company land upon the date of taking and \$9,400 was the value of the lessee's interest in the part of the ditch on Bishop Estate land upon the date of taking.

The question is basically: Is the Honolulu Plan-

tation Company entitled to these amounts or to nothing for the supply ditch?

The answer will depend upon the construction of the two leases.

The Oahu Railway and Land Company lease to the Honolulu Plantation Company (Exhibit 9-I) provides that upon the expiration of the lease "or sooner determination" all improvements shall become the lessor's property. The Bishop Estate lease (Exhibit 9-G) similarly so provides. [819]

But each lease also has an additional provision that in the event of condemnation the lessee's estate shall cease and determine and it shall not be entitled to any compensation, except as to certain improvements. As to improvements made by the lessee after January 1, 1936, in the case of the Bishop Estate lease (December 2, 1943 amendment to the lease) or after the date of the execution of the Oahu Railway and Land Company lease (July 24, 1936), such compensation as shall be awarded for improvements built by the lessee after 1936 shall be divided "as their [lessor-lessee] interests shall appear, dependent upon the then unexpired term of the lease; * * *."

The Government contends that under these leases the Honolulu Plantation Company owns nothing for which it can be compensated because both leases state that at the end of the term "or sooner termination" all improvements shall become the property of the lessor. True, but the Government chooses to overlook the specific provisions controlling in the event of condemnation. It is my belief that here

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The Government contends that under these leases the Honolulu Plantation Company owns nothing for which it can be compensated because both leases state that at the end of the term "or sooner termination" all improvements shall become the property of the lessor. True, but the Government chooses to overlook the specific provisions controlling in the event of condemnation. It is my belief that here

the specific governs the general provisions, and it is obvious that the general clause does not involve termination of the lease by condemnation. In any event the parties took this possibility out from under the general clause by specifically providing for such a contingency, and the specific controls. See *Brooklyn Eastern Dist. Terminal v. City of New York*, 139 F. 2d 1007 (C.C.A. 2d 1944), and *Restatement, Contracts*, Vol. I, paragraph 236.

In view of this holding, upon the basis of the evidence—indeed the only evidence on the point—[820] and believing it proper for valuation purposes to assume that the leases would run their full terms, I find in Civil No. 529 the fair value of the Honolulu Plantation Company interest in this ditch on June 21, 1944, to be:

1. \$6,185 for the part of the Oahu Railway and Land Company land; and
2. \$9,400 for the part on the Bishop Estate land.

III.

In Civil No. 535, is the Honolulu Plantation Company entitled to \$1,350 representing rent prepaid by it under its sublease obligation to Oahu Sugar Company covering the rent period January 11, 1943, to September 21, 1944, and paid while the Navy was in possession under a right of entry from the Honolulu Plantation Company?

When the question is stated all of the facts appearing in the record are known. Those are all of the facts, and while the Honolulu Plantation Company has paid the rent for a period during which it itself did not enjoy possession of the subleased

property, upon just what basis it relies in claiming that in this proceeding the United States should pay that amount to it is not at all clear.

Apparently through its own fault in not protecting itself under these circumstances, the Honolulu Plantation Company was caught between the right of entry it gave the Navy and its obligation to pay rent nevertheless to Oahu Sugar Company, its sublessor. The fact that it is out of pocket to the extent of \$1,350 does not in and of [821] itself entitle it to relief, especially in a proceeding to establish the market value of an estate in land taken by eminent domain. And in this regard under I herein it has been awarded the value of its estate taken by the Government in Civil No. 535.

For lack of proof this claim to compensation is denied. It would appear that if a remedy at all exists it would lie against Oahu Sugar Company, but that, in turn, might depend upon facts not here revealed.

IV.

Is the Honolulu Plantation Company entitled to severance damage?

Under the Company's leases, it is alleged that reserved to it is the right to claim severance damage, and as it has so claimed, this is the question in these consolidated cases.

An affirmative answer involves a possible award on this issue at the rate of \$1,000 per acre for the 1,087.59 cane acres taken while under lease to the Company.

The Company's case is built squarely upon the

Circuit Court's language in *United States v. Baetjer*, 143 F. 2d 391 (C.C.A. 1st 1944), cert. denied, 323 U. S. 772 (1944). In that case the First Circuit Court reversed the lower court and remanded the case for further proceedings, which are now reported in 69 F. Supp. 328 (U.S.D.C. Puerto Rico 1947).

This claim is smaller than the Company's Congressional Claim, for it related to 26 takings (prior ones [822] plus the thirteen here), or 2,428.44 acres for which relief in the sum of \$3,200,000 was asked. Before Congress the Company agreed with the Government that the loss for which it sought relief was a noncompensable capital loss. When the claim reached the Senate, attention was focused upon the part of the claim pending in this Court. With the Baetjer case in mind, the Senate took no action but intimated that the legal issue in these thirteen cases be first resolved.

It is upon the basis of the following that the claim in these cases is predicated.

1. The Honolulu Plantation Company had been developed to the point of being a 36,000-ton sugar (raw) plantation, had been generally successful, and had a good prospect as to the future.

2. Starting in 1939, the Government began taking defendant's property for military use in piecemeal fashion, so that by the date of the outbreak of World War II the takings had reduced the Honolulu Plantation Company to a 21,000-ton plantation, that is, to a point where it could just barely stay in business.

3. Due to military needs in World War II, the Government thereafter in these thirteen separate takings acquired 1,364.35 acres more of defendant's leased land, of which 1,087.59 acres were cane lands. In consequence the Company's cane acreage was reduced to 3,309.75 acres and the Company's agricultural enterprise to a 15,000-ton plantation.

4. There were no other cane lands available in fee or by lease. [823]

5. As a result of these takings bringing this situation about, the land and the permanent improvements thereon remaining have depreciated in value solely due to the severance of the lands taken in these cases, which, with the lands remaining, the Honolulu Plantation Company had operated in a unit as a sugar plantation.

6. The damage caused by this severance is the difference between the value of the Honolulu Plantation Company before and after these thirteen takings. There being no market in 1944 for sugar plantations, the figures used are said to reflect fair value.

The Government stands upon the legal proposition that defendant's evidence describes a business loss and business losses are not compensable in condemnation proceedings. It thus offered no evidence. Indeed, there is no serious dispute upon the law between the parties. The Government concedes that in a proper case severance damage is recoverable. The dispute, therefore, is largely whether the defendant's evidence spells out a proper case of severance damage or an uncompensable business loss.

Summarized, this is the gist of the testimony of defendant's expert witnesses:

A. George L. Schmutz, an appraiser of renown and of wide and varied appraisal experience and author of several books on real estate appraising, such as "Condemnation Appraiser's Handbook" (1938) and "The Appraisal Process" (1941), gave it as his considered opinion that before these takings the fair value of all the Honolulu Plantation Company's physical properties, [824] exclusive of movables and growing crops, was \$4,200,000, and after the takings \$3,113,000, or a loss of \$1,000 per cane acre taken.

Mr. Schmutz's testimony disclosed that he literally considered everything without—in expert fashion—giving any one item any particular weight or dollar value. To mention some of his considerations, he said he took into general consideration:

1. That the Honolulu Plantation Company was an "integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productivity" by which he meant it grew sugar cane, processed it into raw sugar, and further refined it into white sugar;

2. The Company's dividend record;

3. That in 1940 the Company renewed or extended its major leases to 1965 and, in effect, became a new enterprise;

4. The additional capital of \$1,325,000 invested since the leases were renewed;

5. The Company's book value;

6. Its earning record;

7. A \$1,000-per-acre standard as representing widely held local opinion as to the per-acre value of sugar-cane land;

8. That the mill's capacity before the takings was 20,000 tons of raw sugar and after 15,000 tons;

9. That the takings affected the value of the mill by causing an overcapacity, which increased operating costs, resulting in not as fair a return upon the investment as was previously the case; [825]

10. The fact that the lands were not replaceable; and

11. That raw sugar to refine was not purchasable in sufficient amount to utilize the mill's capacity.

And upon cross-examination Mr. Schmutz allowed that:

(a) He prepared the appraisal section of the Company's claim to Congress;

(b) He studied the Company's earning record as an indication of value;

(c) He studied the Company's dividend record to see if it was successful, and had it not so shown, his opinion would have been different;

(d) There was an error in his figures in the Congressional Claim (Exhibit O, Table I) due to inaccurate data supplied him, but said if the Company lost \$334,265 in 1938 and \$197,559 in 1939, he could not see that it would affect his valuation; he did not know the 1940 net income of \$175,334.81 was used to cover losses of prior years; that if net income available from 1938 to 1943, inclusive, for interest on investment was as reflected by Exhibit

O, Table I, his opinion of value would be less, but just how much he could not say as he relied on no one factor alone;

(e) He deemed the Company successful, though for sixteen years after 1924 the Company paid more in dividends than the amount of earnings available;

(f) As to the Company in 1936 renewing its major leases, he relied upon the statement of attorneys, but if that be not so, his value would decrease at the rate of \$1,000 per acre; and said he was not familiar with [826] the details of the leases;

(g) The Company's net income figures since 1937 included "Compliance Payments," a Government subsidy under the Sugar Act (7 U.S.C. Section 1100 et seq.), and in 1943 the Company paid a dividend of \$150,000 out of \$186,969 available for that purpose, of which \$177,416 had been received as a Government subsidy;

(h) The remaining cane lands, the mill, the irrigation system, and all permanent improvements were as good the day after the takings as before, but he said that they then were of lower value due to an overcapacity; for what was left, he said a buyer would pay less because the mill then became oversized and represented too much capital invested in relations to dollars which it could earn with the land available—in other words, that the land left called for a smaller mill with but a 15,000-ton capacity in order to make a profit on the invested capital;

(i) He agreed with the President of the Com-

pany that by the Government's takings the Company had lost over 50% of its invested capital, but agreed that Exhibit O, Table IX, did not so show;

(j) In 1940 and thereafter it cost the Company more to grow and produce raw sugar than to buy it;

(k) He personally knew nothing of the price of cane land and had made no investigation;

(l) He considered that the demand indicated that the public highly regarded the Company's stock, but granted that it dropped from \$30 in 1936 to \$8 in 1937, 1938, 1939; from 1939 to 1940 down to \$4.62; and rose in 1943 to \$9.87 and to \$10.25 in 1944: [827]

(m) He assumed good management of the plantation, but granted it was a speculative factor affecting profits;

(n) Loss of land permanently impaired ability of the remaining property to produce earnings commensurate with residual value;

(o) He agreed with the Company's President's statement to Congress that the Company with lands remaining could only be operated "inefficiently, expensively, and, therefore, uneconomically";

(p) He gave no dollar value to any of the factors he considered; and

(q) Defined a business loss to be a shrinkage of value not due to the property itself, but an intangible as distinguished from a tangible loss.

B. C. Campbell Crozier, an experienced local appraiser, currently Territorial Deputy Tax Commissioner in charge of assessments, after stating his general familiarity with the Plantation Company's prop-

erty, said that in his judgment upon a before and after taking basis, the Honolulu Plantation Company's physical properties, excluding movables and growing crops, had a 20% diminishing value, or were about \$1,000,000 less valuable after these takings.

In support of his opinion, Mr. Crozier stated that:

1. By the takings 1,087 acres of cane land had been lost, or 23% of the Company's cane acreage; and

2. He used the "\$1,000-an-acre rule", for it represented the amount of capital required to turn leased virgin land into irrigated cane land. So the before value was approximately \$4,000,000 and the after [828] value approximately \$3,000,000, as around 1,000 acres were taken away.

Upon cross-examination Mr. Crozier allowed substantially the same things as did Mr. Schmutz, that is, he conceded that he took into consideration generally in forming his judgment nearly all aspects of the Company on an over-all basis but to no particular item did he give any special weight or dollar-and-cents value. For example, he said that:

1. To the Company's earning record he generally gave some weight, but was not acquainted with the Company's losses;

2. He had a general familiarity with the Company's leases and assumed they were renewed in 1936, and considered the new capital invested in the leased land during the three years following;

3. He based his opinion essentially upon the loss of capital;

4. He considered the Company economically run though it bought raw sugar to refine for less than it could produce it itself;

On the nonexpert side there is the testimony of:

A. Philip E. Spalding, President of C. Brewer & Company, Ltd., agent for the Honolulu Plantation Company, who is also Vice-President and an attorney in fact of and for the Honolulu Plantation Company; and of

B. S. L. Austin, former manager of the Honolulu Plantation Company, now a Vice President of C. Brewer & Company, Ltd., and an attorney in fact for the Honolulu Plantation Company. [829]

A. Mr. Spalding testified that:

(1) Before the takings the mill had a potential of 22,000 tons of sugar per year, and of but 15,000-16,000 tons per year after these takings, and consequently the mill's operation became very expensive and it could not be operated as efficiently, lacking a year-round supply of cane, hence the mill's value was reduced;

(2) The takings had a little effect upon the Company's irrigation system and other improvements—indeed, all in all the takings made the Company an unprofitable economic enterprise;

(3) There was no market upon which at the time of these takings a plantation could be sold, but in 1943 he had tried to interest the Oahu Sugar Company in buying the Company, but not until late 1946 did he succeed in selling what was left to that company and then as of January 1, 1947;

(4) The takings started piecemeal under rights of entry, but later the Navy moved in without

rights of entry and things got so bad that he described the Company's grave position to Vice Admiral Ghormley, asking that the Navy buy the Company outright else it would have to appeal to Congress for relief, as it had no legal remedy available. (See Exhibit I.)

(5) The Company began to lose value on a descending scale as takings occurred until at some point it was pushed over the edge and became an uneconomic concern—an economic failure—and could no longer exist as a profitable company, hence its remaining property had much less value; [830]

(6) During the war, by special arrangements, the Company was able to keep going as it could buy raw sugar to refine from 28 local plantations. Ordinarily, these 28 plantations sent their raw sugar to their own refinery located at Crockett, California, where their cooperative known as the California and Hawaiian Corporated operated a refinery. For this period to supply the Army and Navy in the Pacific with white sugar, all plantations sold their raw sugar to the Company, as it had the nearest and only sizable refinery in Hawaii. In time of peace the Company could buy raw sugar locally from only one plantation, and that in a quantity insufficient to utilize the mill's capacity.

B. Mr. Austin's testimony as to value was similar to Mr. Spalding's, though in greater detail as to the sugar process and specific items and figures. But on the point under consideration he stated specifically that before the takings the Honolulu Plan-

tation Company was worth \$4,300,000 and only \$3,300,000 after, a loss of \$1,000,000. Mr. Austin, too, used the \$1,000-an-acre rule of thumb used locally by plantation men.

There can be no doubt that by these thirteen piecemeal takings of 1,087 acres of cane land upon which the Honolulu Plantation Company had leases, the Company has suffered a fatal blow. To be sure, as the takings continued the Company could well foresee that postwar it economically faced "impending death." (See Exhibit I.)

But this, it must be remembered, is an action at [831] law confined under the Fifth Amendment to rigid rules requiring the Government to pay just compensation only for what it takes. Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding. The slight intimation in *United States v. General Motors*, 323 U.S. 373 (1945), that there may be a small area wherein, upon unusual facts, equitable principles become operative, has by succeeding cases been narrowly confined. See *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

The parties do not dispute the law. They take issue only as to what the evidence establishes.

It is conceded that where but a part of an owner's property is taken he may recover in a condemnation proceeding not only the fair market value of the land taken, but also for any decrease in the value of the untaken part of the land unit. See *United States v. Miller*, 317 U.S. 369, 376 (1943), 147 A.L.R. 55, and cases there cited.

And it is agreed that in a condemnation case a landowner cannot be compensated for business losses. Upon a balancing of conflicting public and private interests, the courts have consistently held over the years that indirect losses and consequential damage must be borne by the private property owner, and not by the United States. In *Mitchell v. United States*, 267 U.S. 341 (1925), the Supreme Court said on this point, at p. 345:

. . . The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co. v. Providence*, 262 U.S. 668, 675, *Compare Sharp v. [832] United States*, 191 U.S. 341; *Campbell v. United States*, 266 U.S. 368. No recovery therefor can be had now as for a taking of the business.

And in *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946), the Supreme Court stated:

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receive less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense

of relocation and other such consequential losses are refused in federal condemnation proceedings.

While in the Baetjer case, 143 F. 2d 391, 395 (C.C.A. 1st 1944), the same rule is recognized in this language:

The "just compensation" guaranteed by the Fifth Amendment "is for the property, and not to the owner" (*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S. Ct. 622, 626, 37 L. Ed. 463), that is to say, "the sovereign must pay only for what it takes, not for opportunities which the owner may lose" (*United States v. Powelson*, 319 U.S. 266, 282, 63 S. Ct. 1047, 1056, 87 L. Ed. 1390) so that, as a result, "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *Id.* 319 U.S. at page 281, 63 S. Ct. at page 1055, 87 L. Ed. 1930; *Mitchell v. United States*, 267 U.S. 341, 345, 45 S. Ct. 293, 69 L. Ed. 644, and cases cited.

Defendant, however, relies upon other language in the Circuit Court's opinion in the Baetjer case. The Baetjer case came to the appellate court from the federal district court for Puerto Rico, and the facts of the case are very similar to the facts here in that a sugar plantation using various scattered fee-owned parcels as an agricultural unit was involved, the Government had taken some of its land and it endeavored to recover [833] severance damage for the decreased value of the remaining physical properties, especially its mills. The district court excluded certain evidence and ruled against

Baetjer and the other trustees of Eastern Sugar Associates. In so doing the Circuit Court said (143 F. 2d 391, 396):

. . . If it [the excluded evidence] means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of *Mitchell v. United States*, *supra*. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market . . ., then the evidence would tend to show a compensable loss. In short, the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.

Under these instructions upon remand, the lower court received the hitherto excluded evidence and upon the issue also evidence tendered by the Government, and thereafter held that though there had been a legal severance of the scattered lands

which had been operated as a unit, the owner had failed to prove that the damage suffered by the severance was compensable. The loss suffered, it declared, was a noncompensable business loss. *United States v. 7936.6 Acres*, 69 F. Supp. 328 (U.S.D.C. Puerto Rico 1947).

Here, to say the least, the situation is confusing. First, the evidence reveals that this claim forward a part of a larger claim made to the 79th Congress, and the Company represented to Congress in unmistakable [834] language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.

Secondly, though a prudent buyer, to be sure, would take general note of all the factors mentioned by the experts, nevertheless stripped of all the generalities, the experts essentially base their judgment upon the same point as the former plantation manager, that is, all said that the Company suffered a capital loss at the rate of \$1,000 per cane acre as it takes that number of dollars to turn virgin land into land capable of growing sugar cane successfully. Thus far, as before Congress, the Company is talking the language of a capital loss. But here it takes a step beyond, and

Thirdly, envelopes itself in the language of the Baetjer case. At this point the witnesses, carrying forward the picture of what has happened, theoretically place what is left upon the block in the market place and then, viewing it from the eyes of a buyer, say with the First Circuit Court that it is not worth the amount of invested capital which

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it represents but something substantially less, and therefore what has happened to the Company has depreciated the value of its remaining property.

It would seem that as if by magic a noncompensable capital loss has now become a loss of real property value.

Very definitely the witnesses here meant what the First Circuit Court considered in that case a witness might have meant by "in value of excess equipment." Here all the evidence and the only evidence, as given by two [835] expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of \$1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

Although not a little disturbed by the facility by which an admitted capital or business loss is transformed into a loss of real property value, theory must yield to the reality of the market price where values are established.

The ascertainment of the fair market value, or here in the absence of a market for sugar plantations, of "fair value" in a condemnation proceeding is a very practical matter. While it is true that after these takings what was left was in just

as good a condition, generally, as it had been the day before, it does not necessarily follow that it therefore is just as valuable. It is plain common sense that a buyer would pay for property what it is worth to him—buy at a figure at which he could reasonably foresee making a profit upon his investment. Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken. [836]

Because in its representations to Congress the **Company** made a mistake of law in interpreting its facts, I do not believe that its right to recover upon the strength of the Baetjer case should be barred. It still remains true that by the takings it suffered a capital loss, but as that, in turn, directly affected the value of the remaining property, severance damage occurred and may be recovered here.

IV-A

Should the measure of damage be applied to 1,087.59 acres?

So far it has been assumed that the Company had long-term leases upon the land which it operated as an agricultural unit and that those leases allowed it to claim severance damages. The Government questions both of these representations made by the Company.

The breakdown of the 1,087.59 lost acres as to sources is to be found in Exhibit 6 and the leases themselves in the Exhibit 9 series—leases which interestingly reflect that the land situation in Ha-

waii gives leasehold plantation companies as much trouble as do their agricultural and marketing problems.

Exhibit 9-A is a lease from L. L. McCandless. This 30-year lease expired without right of renewal on December 31, 1939. A tenancy at will existed thereafter, for on August 18, 1941, Mr. McCandless having died, the representatives of his estate approved a continuation of the tenancy at will for an indefinite period, but for no longer than the duration of the probate administration of the estate because thereafter Mr. McCandless' property [837] was to be handled by a trust created under his will. There is no evidence that the probate had been concluded and that a new lease had been obtained from the McCandless trust. Presumably, then, the Company remained in possession as a tenant at will.

Exhibit 9-B is a lease from McCandless, expiring without right of renewal on August 31, 1944, and containing certain restrictions. This lease expired about two months after the agreed date of taking (June 21, 1944). Like Exhibit 9-A, this lease has no condemnation clause.

Exhibit 9-C is also a McCandless lease, expiring without right of renewal on December 31, 1944. It contains a clause that at the end of the term "or other sooner determination" the lessee should surrender the premises and all improvements thereon. The lease contains no specific condemnation clause.

Exhibit 9-D is an extended lease from Francis H. I. Brown, expiring without right of renewal on

September 30, 1946, but subject to cancelation upon 90 days' notice in writing and in that event the lessee could have time to harvest crops. The lease contains no specific condemnation clause or clause as to improvements.

Exhibit 9-E is an extended lease from Noa W. Aluli, expiring without right of renewal on December 31, 1948. The lease contains no specific condemnation or improvement clause.

Exhibit 9-F is a sublease from Oahu Sugar Company of Bishop Estate Land, running for 24½ years from January 1, 1941. It is not assignable without the [838] sublessor's consent, and it has a general termination clause and a specific condemnation clause providing that in that event the leasehold estate shall terminate and the lessee shall not have a right to claim compensation against anyone, but that all compensation shall go to the sublessor exclusively.

Exhibit 9-G is a 25½-year lease from the Bishop Estate from July 1, 1940, containing a specific condemnation clause reserving in the lessee the right in its own behalf to claim severance damage.

Exhibit 9-H is a lease from the Austin Estate for 25 years from January 1, 1941, which contains a condemnation clause similar to the one in Exhibit 9-G.

Exhibit 9-I is a 25½-year lease from July 1, 1940, from the Oahu Railway and Land Company, assigned by it to its subsidiary, The Hawaiian Land & Improvement Company, Limited, with a like condemnation clause.

Exhibit 9-J is a lease from the Queen Emma Estate for 29 years from January 1, 1937, which also has a like condemnation clause.

Exhibit 9-K is an alleged lease from the Damon Estate. The Company claims that by two letters attached to the Exhibit, the lease which expired in 1943 was extended for 10 years, or until December 31, 1953. These letters and also other letters (Exhibits A, E, F, G and H) reveal that all of the terms and conditions of the proposed lease had been settled, but that the parties expressly contemplated the execution of a written lease, which was never done. Nor did the Company ever seek specific performance of the contract, though it did [839] submit to the Estate a proposed form of lease. The Estate indicated on August 15, 1941, that it rejected the Company's form, and meanwhile condemnation actions affected the agreement and also the Estate indicated in the letter that it wanted to make certain changes in the basic agreement. On August 21, 1941, the Company rejected the proposed changes and said that the condemnation of certain areas of land covered by the October 21, 1940, agreement created no problems, for as a matter of law the agreement was subject to such a contingency, and wrote that it held the Estate to its agreement. See Exhibit 18. During 1943, the manager of the land department of C. Brewer & Company, Ltd., in behalf of Honolulu Plantation Company, by letters (Exhibits G and H) acknowledged that the Company's Damon Estate lease was to expire on December 31, 1943.

After that date the Company seems to have remained in possession as a tenant at will under the old lease, which oddly contained no condemnation clause—nor more strangely did the draft of the proposed new lease (Exhibit B). It is of interest to note that between 1941 and 1943 more takings by the Government of Damon lands involved in the proposed lease were occurring, so that it was becoming possible to include less than a hundred acres in the new lease, whereas the old one had originally covered nearly a thousand acres. Perhaps for this reason the Company never brought suit for specific performance of its contract to lease the lands covered by the agreement, but not condemned.

The leases in the Exhibit 9 series, which are the leases upon which the Company relies, do not wholly [840] support its position. To repeat, for purposes of orientation, the Company bases its claim upon the representations that:

(a) In 1936 it renewed its four major leases to 1965, except as to one, its Damon lease, which was said to have been extended to 1953; invested over one million dollars of new capital; and thus in effect became a new enterprise;

(b) Before these 13 takings it had 4,397.34 acres of cane land under cultivation and afterwards only 3,309.75 acres, a difference of 1,087.59 acres, which decreased the value of what remained at the rate of \$1,000 per acre.

The leases upon which the Company relied do not bear out these figures. The prospect, based on

prior dealings over the years with the same lessors, of being able to obtain renewals of expired leases even at greater cost, while a good prospect, did not, nevertheless, create in the Company a new estate in the lands or give it a legal right to cause such to come to pass. *Emery v. Boston Terminal Co.*, 178 Mass. 172 at 185, 59 N.E. 763 (1901).

Upon leaseholds affected by the takings, 440.175 acres of cane land out of the 1,087.59 acres lost can be relied on to measure the severance damage, for they were a part of a larger acreage in which the Company did have substantial leasehold estates. That is, it had at the consolidated date of taking (June 21, 1944) long-term leasehold estates under terms permitting it to claim severance damage in lands leased from: [841]

1. The Queen Emma Estate, from which taken in these proceedings were (Exhibit 9-J).....	21.79	acres
2. The Bishop Estate, from which taken here were (Exhibit 9-G)	311.833	acres
3. The Oahu Railway and Land Company, from which taken here were (Exhibit 9-I).....	103.64	acres
4. Plus land owned in fee by the Company, from which taken here were	2.912	acres
Total.....		440.175 acres

Dismissed from consideration in applying the rule of damage are the following:

a. The Aluli lease (Exhibit 9-E) simply because it does not enter into the calculations totaling 1,087.59 acres lost and upon which the Company bases its claim.

b. The Oahu Sugar Company lease (Exhibit 9-F), of which 48.61 acres, though forming a part

of the 1,087.59 acres, cannot be included because by its condemnation clause the Company is not entitled to severance damage.

e. The three McCandless leases (Exhibits 9-A, 9-B, 9-C), of which 3.795 acres form a part of the 1,087.59-acre claim, because the Company had no substantial estate in these lands as the leases had expired without right of renewal and the Company was in possession merely as a tenant at will.

This leaves the question as to whether or not the so-called Damon lease (Exhibit 9-K) can be included in computing the severance damage at the rate of 595.01 acres.

The known facts are that:

1. The old Damon lease expired December 31, 1943. It had no condemnation clause. [842]

2. Anticipating the expiration of the then existing lease, on October 18, 1940, the trustees of the Damon Estate offered in writing (Exhibit 9-K) to enter into a new lease with the Company upon terms specified for a period of ten years from January 1, 1944. The offer disclosed that due to anticipated condemnation proceedings not all of the lands involved might be available for lease.

3. By letter dated October 21, 1940, the Company accepted the Estate's offer. (Exhibit 9-K)

4. By the terms of this contract both parties had expressly in mind the execution of a formal lease. This was never done, nor did the Company ever bring suit for specific performance.

5. The Company submitted a proposed formal lease (Exhibit B), which like the old lease had no condemnation clause.

6. The Estate began to hedge in view of condemnation actions anticipated in October 1940, which had by August 21, 1941, become realities, and indicated that the Company's proposed lease was not satisfactory for various reasons. (Exhibit E)

7. The Company on the same date notified the Estate that it held it to its contract and that by law, of course, condemned acres would be excluded from the lease. (Exhibit 18)

8. During 1943 the Company acknowledged that its old lease expired December 31, 1943. (Exhibits G and H)

9. Subsequent to the agreement of October 1940, the Company notified the Estate that in reliance thereon it [843] had done certain things to and on the land. (Exhibit C). The Company, in reliance upon the so-called new lease, had planted new crops, prepared new cane fields, and put more money into the irrigation system. It is said in reliance upon the October 1940 agreement the Company invested \$75,000 in the Damon lands, and when the old lease expired it paid the Estate the rent called for by the 1940 agreement and the Estate accepted it.

Just how many Damon acres the Company had upon the date of taking (June 1944) is not made clear. All that appears is that Exhibit O, Tables XIII and XIV, shows that in 1939 the Company had 977.5 acres of Damon Estate cane land; that by the end of 1943 condemnation actions had reduced the acreage to 208.46 acres and by the end of 1944 to 64.75 acres.

This is interesting, especially as it probably explains why the Company never sought specific performance of its 1940 contract, but it is of no importance. This is so because by the consolidation order—oddly consented to by the Government—all of these thirteen takings must be deemed to have occurred on June 21, 1944. Therefore, on that day upon this artificial basis the Company must have had more acreage than it lost.

In the light of the consolidation order the real question is, therefore: Did the Company have on June 21, 1944, such an interest in the remaining land held by it under the Damon title as to entitle it to severance damage?

Relying upon *Wong Kwai v. Dominis*, 13 Haw. 471 [844] at 477 (1901), the Company contends that it had by reason of the October 1940 agreement not merely a contract for a lease but actually a new lease for 10 years upon the Damon lands. With this contention the Government, of course, disagrees.

The facts, in my opinion, dictate a negative answer to the question above stated.

Whether here there is a lease or an executory contract for a lease depends essentially upon the intention of the parties, as gathered from the terms of their October 1940 agreement. If it is a lease, the Company acquired an estate in the lands for 10 years from January 1, 1944. If it is not, it acquired simply an executory right to compel the Damon Trustees to convey to it such an estate, for breach of which contract the Company could re-

cover damages or sue for specific performance. *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 36 F. Supp. 536 (E. D. Ky. 1941), affirmed 125 F. 2d 288 (C.C.A. 6th 1942); *Thompson on Real Property* (1940), Vol. III, Sec. 1214 et seq.; *Tiffany, Landlord and Tenant*, Vol. I, p. 371; 32 *Am. Jur.* "Landlord and Tenant", Sec. 28 et seq.

The law of Hawaii on this subject is in accord. See *Larrisich v. Schaefer*, 6 Haw. 140 (1875), and the case of *Wong Kwai v. Dominis*, *supra*, upon which the Company relies and which the court said was "a case of unusual difficulty," actually stands for no different proposition of law. The language from that case upon which the Company no doubt relies:

. . . The fact that a formal lease was contemplated did not prevent the letter and the acceptance of [845] its terms from constituting a final binding contract, the preparing and signing of the lease being merely in execution of the contract . . .

gives the Company but passing comfort, as all of the authorities agree that in a factual situation of the type with which we are here concerned the answer to the question of whether or not the facts spell out a lease or simply an agreement for a lease is dependent upon the intent of the parties. The fact that the parties contemplate executing in the future a formal lease does not, of course, prevent the agreement itself being a lease if such was the intention of the parties, as clearly manifest by the facts. On the other hand, dependent upon the

facts, of course, such a provision for the execution of the lease in the future may be some evidence that the parties did not by the agreement then and there intend a present demise of the premises.

A close examination of the facts shows that while it is true that all of the terms were generally specified in abbreviated style or were readily ascertainable with reference to other facts, nevertheless the agreement speaks not in terms of a present demise of an estate to begin at a future date, but, on the contrary, reveals an agreement to later execute a lease. As before noted, the fact that the parties expressly, as here, contemplate the execution of a formal lease does not in and of itself prevent an agreement from being a lease if such is the parties' intent and if they regard the formal lease as simply a reassurance. But unless that is apparent—and it is not here—the provisions for the execution of a lease with covenants upon the basis of the agreed [846] upon terms is strong evidence that the agreement was not intended by the parties to be the lease. Here the offer concluded: "If these terms are agreeable a formal lease can then be drawn up," and the acceptance concluded: "We will prepare a tentative form of lease for submission to you."

More importantly, the agreement does not speak in terms of a present demise. The Estate indicated that it was "willing to lease," referred to the "land to be leased" and to certain areas "to be surrendered" by the Company, said what the rent was "to be" "if" the Sugar Act continued.

And the acceptance of the offer spoke of the lands "to be leased." All in all, by the language used by the parties the emphasis is not upon then and there creating an estate, but is upon what they bound themselves to do, respectively, in the future when executing a lease. (See letters attached to Exhibit 9-K.)

This conclusion is attested to by the subsequent acts of the parties. For instance, by its August 15, 1941, letter (Exhibit E) the Estate said: "Due to our inability now to lease [certain condemned lands] . . . the Trustees . . . now propose to lease . . ." and there is other like language in Exhibit F. In rejecting the Estate's attempt to vary the terms of the agreement, the Company spoke (Exhibit 18) not of a lease, but of "a binding agreement." Indeed, the draft lease submitted by the Company (Exhibit B) is perhaps the best evidence that the Company itself did not regard the agreement as the lease, as the date is left blank and certain covenants from the old lease not mentioned in the 1940 contract [847] are inserted.

Strong as is the Company's equity, the facts do not support its position that it had a new ten-year lease of Damon lands from January 1, 1944.

At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance. An estate in that indefinite condition, involving the purchase of a law suit, would not be attractive to a buyer.

For these reasons, I do not believe that the Company had an estate in the Damon lands which supports its claim for severance damage with respect thereto at the rate of \$1,000 per acre. Whether or not at a different rate it might have been entitled to severance damage for acreage remaining after these takings on which the Company had leases with but a very short time, comparatively, to go and without having a right of renewal and with respect to other lands which it held on a year to year basis as a tenant at will (Exhibits 9-A, 9-B, 9-C) is a subject upon which there is no proof and therefore no award as to such lands can be made.

Accordingly severance damages may be measured upon the basis of 440.175 acres only.

SUMMARY

I.

Civil No. 521	Parcel 2A	\$	100
Civil No. 521	Parcel 2B		75
Civil No. 529	Parcel F-1, as follows:		
	The land alone	\$	770
	The degree to which the pump house and four wells enhanced its value	\$23,000	
	The frame house		768
	The sheds		100
	Total.....	\$	24,638
Civil No. 529	Parcel F-2		75
Civil No. 535	2.732 acres	\$	14,100

II.

Civil No. 529	For the part of the ditch on Oahu Rail- way and Land Company land.....\$	6,185
Civil No. 529	For the part of the ditch on Bishop Estate land	9,400

III.

Civil No. 535	No award, for failure of proof, as to pre- paid rent.
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IV.

Severance damage upon the basis of 440.175 acres.....	\$440,175
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Judgment approved as to form in conformity here-
with will be signed upon presentation.

Dated at Honolulu, Territory of Hawaii, August
22, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed Aug. 22, 1947. [849]

[Title of District Court and Causes Nos. 514, 521,
525, 527, 529, 532, 533, 535, 536, 540, 544, 548, 684.]

JUDGMENT

The above entitled actions, by order of consoli-
dation, in respect to this defendant, Honolulu Plan-
tation Company, having duly come on for hearing
before this Court, and said cause having been tried
by the Court, jury waived, and pursuant to the
decision of said Court filed herein on August 22,
1947, said defendant is entitled to just compensa-
tion as follows:

I.

Civil No. 521	Parcel 2A	\$ 100
Civil No. 521	Parcel 2B	75
Civil No. 529	Parcel F-1, as follows:	
	The land alone	\$ 770
	The degree to which the pump house and four wells en- hanced its value	23,000
	The frame house	768
	The sheds	100
<hr/>		
	Total.....	\$ 24,638
Civil No. 529	Parcel F-2	75
Civil No. 535	2.732 acres	\$ 14,100

II.

Civil No. 529	For the part of the ditch on Oahu Rail- way and Land Company land.....	\$ 6,185
Civil No. 529	For the part of the ditch on Bishop Estate land	9,400
Severance Damages		440,175
<hr/>		
	Total.....	\$494,748

And it appearing to the Court from the record in this cause:

1. That on June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court the sum of \$155 as estimated compensation for the land in Parcels 2A and 2B in Civil No. 521 leaving a deficiency in the amount of \$20.00. [854]

2. On June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court

the sum of \$650.80 as estimated compensation for the land and improvements in Parcels F-1 and F-2 in Civil No. 529, leaving a deficiency on account of land and improvements in the amount of \$24,062.20.

3. On June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court the sum of \$1,366 as estimated compensation for the land in the Parcel containing 2.732 acres in Civil No. 535, leaving a deficiency in the amount of \$12,734.

Now, therefore, it is hereby ordered, adjudged and decree:

I.

That the just compensation for said lands and improvements thereon and for severance damages, involved in the consolidated suit Civil Nos. 514, 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, is in the amount of \$494,748, with interest as hereinafter provided.

II.

That to complete the payment of the full amount of the just compensation, the petitioner shall pay into the registry of this Court the sum of \$492,576.20, with interest at the rate of six per cent per annum from June 21, 1944 until paid into the registry of this Court.

It is further ordered that upon the deposit of the [855] deficiencies hereinabove adjudicated, the

Clerk of this Court be, and he is hereby authorized and directed to disburse the same to the defendant, Honolulu Plantation Company.

Dated: Honolulu, T. H., this 5th day of November, 1947.

/s/ WM. F. THOMPSON, JR.,
Clerk of the United States District Court for the
Territory of Hawaii.

The foregoing Judgment is hereby approved.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
Territory of Hawaii.

[Endorsed]: Filed Nov. 5, 1947. [856]

[Title of District Court and Causes.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Petitioner, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final judgment of this Court in the above entitled actions, consolidated for trial in respect to the defendant Honolulu Plantation Company, entered on November 5, 1947, determining just compensation for land, improvements and severance damage as therein appears.

Dated Honolulu, T. H., this 3rd day of February, 1948.

UNITED STATES
OF AMERICA,

By /s/ W. BRAXTON MILLER,
Special Asst. to the Atty. Gen.

[Endorsed]: Filed Feb. 3, 1948.

[860]

[Title of District Court and Causes.]

NOTICE OF CROSS-APPEAL TO CIRCUIT
COURT OF APPEALS FROM PART OF
JUDGMENT

Notice is hereby given that the Honolulu Plantation Company, one of the defendants in these consolidated thirteen condemnation cases, cross-appeals to the Circuit Court for the Ninth Circuit from so much of the Judgment entered in this consolidation action on November 5, 1947 as disallows just compensation for severance damages suffered by this defendant through the taking of said defendant's property interest in 595.01 acres of cane land covered by those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

Dated February 3, 1948.

/s/ C. DUDLEY PRATT,
Attorney for Cross-Appellant.

PRATT, TAVARES &
CASSIDY,
Attorneys at Law,

[Endorsed]: Filed Feb. 3, 1948.

[864]

[Title of District Court and Causes.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

For good cause shown and in the discretion of the Court,

It Is Hereby Ordered that Petitioner, United States of America, shall have ninety (90) days from February 3, 1948, the date of Notice of Appeal, to file the record on appeal in the above entitled case and to docket the same in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Honolulu, T. H., this 26th day of February, 1948.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
District of Hawaii.

[Endorsed]: Filed Feb. 26, 1948.

[968]

[Title of District Court and Causes.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

For good cause shown in the discretion of the
Court,

It Is Hereby Ordered that Defendant' Honolulu
Plantation Company, Limited, shall have ninety
(90) days from February 3, 1948, the date of No-
tice of Appeal, to file the record on cross-appeal in
the above entitled case and to docket the same in
the United States Circuit Court of Appeals for the
Ninth Circuit.

Dated Honolulu, T. H., this 4th day of March,
1948.

/s/ J. FRANK McLAUGHLIN,

Judge of the United States District Court for the
District of Hawaii.

[Endorsed]: Filed March 4, 1948.

[872]

[Title of District Court and Causes.]

STATEMENT OF POINTS ON APPEAL

1. The district court erred in holding that the Honolulu Plantation Company was entitled to severance damages.

2. The district court erred in making any award to the Honolulu Plantation Company on account of severance damages.

3. The district court erred in awarding the Honolulu Plantation Company \$440,175 as severance damages.

UNITED STATES
OF AMERICA,
Appellant.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ W. BRAXTON MILLER,
Special Asst. to the Atty. Gen.,
Honolulu, Hawaii.

/s/ J. F. COTTER,
Attorney, Dept. of Justice,
Washington, D. C.

[Endorsed]: Filed March 5, 1948.

[876]

[Title of District Court and Causes.]

DESIGNATION OF RECORD ON APPEAL

The United States, appellant in the above-entitled causes, which were consolidated for trial, designates the following for inclusion in the record on appeal. For convenience, the 13 cases are referred to by their docket numbers. For the same reason, parts of the record as to matters arising after the cases were consolidated are treated together.

Dates of Filing

1. Civil No. 514: Petition, June 21, 1944; Declaration of Taking, February 10, 1945; Judgment on Declaration of Taking, February 10, 1945; Answer of Honolulu Plantation Co., February 17, 1945.

2. Civil No. 521: Petition, July 17, 1944; Declaration of Taking, July 17, 1944; Judgment on Declaration of Taking, July 17, 1944; Answer of Honolulu Plantation Co., August 7, 1944; Amended Declaration of Taking, October 30, 1945; Judgment on Amended Declaration of Taking, October 30, 1945. [880]

3. Civil No. 525: Petition, August 10, 1944; Answer of Honolulu Plantation Co., November 2, 1944; Declaration of Taking, February 10, 1945; Judgment on Declaration of Taking, February 10, 1945.

4. Civil No. 527: Petition, August 28, 1944; Declaration of Taking, March 9, 1945; Judgment on Declaration of Taking, March 9, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

5. Civil No. 529: Petition, September 8, 1944; Declaration of Taking, September 17, 1945; Motion for Order Amending Petition, September 17, 1945; Order Amending Petition, September 17, 1945; Judgment on Declaration of Taking, September 17, 1945.

6. Civil No. 532: Petition, September 16, 1944.

7. Civil No. 533: Petition, September 21, 1944; Declaration of Taking, August 13, 1945; Motion for Order Amending Petition, August 13, 1945; Order Amending Petition, August 13, 1945; Judgment on Declaration of Taking, August 13, 1945.

8. Civil No. 535: Petition, October 11, 1944; Declaration of Taking, August 27, 1945; Motion for Order Amending Petition, August 27, 1945; Order Amending Petition, August 27, 1945; Judgment on Declaration of Taking, August 27, 1945.

9. Civil No. 536: Petition, October 20, 1944; Motion for Order Amending Petition, February 27, 1945; Order Amending Petition, February 28, 1945; Declaration of Taking, August 20, 1945; Motion for Order Amending Petition, August 20, 1945; Order Amending Petition, August 20, 1945; Judgment on Declaration of Taking, August 20, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

10. Civil No. 540: Petition, October 30, 1944; Declaration of Taking, October 5, 1945; Motion for Order Amending Petition, October 5, 1945; Order Amending Petition, October 5, 1945; Judgment on Declaration of Taking, October 5, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

11. Civil No. 544: Petition, November 28, 1944;

Declaration of Taking, January 29, 1945; Judgment on Declaration of Taking, January 29, 1945.

12 Civil No. 548: Petition, January 18, 1945; Declaration of Taking, November 1, 1945; Motion for Order Amending Petition, November 1, 1945; Order Amending Petition, November 1, 1945; Judgment on Declaration of Taking, November 1, 1945.

13. Civil No. 684: Petition, December 6, 1945; Declaration of Taking, December 6, 1945; Judgment on Declaration of Taking, December 6, 1945; Motion for Order Amending Petition and Judgment on Declaration of Taking, April 22, 1946; Order Amending Petition and Judgment on Declaration of Taking, April 22, 1946; Answer of Honolulu Plantation Co., June 18, 1946.

14. Civil Nos. 514, 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548, 684: Motion for Consolidation, February 17, 1945; Affidavit for Consolidation, February 17, 1945; Stipulation for Consolidation, February 17, 1945; Order for Consolidation, February 17, 1945; Stipulation, February 17, 1945; Judgment, February 17, 1945; Satisfaction of Judgment—Honolulu Plantation Co., February 19, 1945; Motion for Consolidation, October 9, 1946; Motion for Bill of Particulars, November 6, 1946; Order Granting Motion for Consolidation, November 14, 1946; Order for Consolidation, November 22, 1946; Order Denying Motion for Bill of Particulars, November 26, 1946.

Record of Proceedings at the Trial: Decision of the Court, August 22, 1947; Judgment, November

5, 1947; Government's Notice of Appeal, February 3, 1948. [883]

Statement of points upon which appellant relies.

This Designation of the Contents of the Record on Appeal.

UNITED STATES
OF AMERICA,
Appellant.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ W. BRAXTON MILLER,
Special Asst. to the Atty. Gen.,
Honolulu, Hawaii.

/s/ J. F. COTTER,
Attorney, Dept. of Justice,
Washington, D. C.

[Endorsed]: Filed March 5, 1948.

[884]



[Title of District Court and Causes.]

STATEMENT OF POINTS ON
CROSS-APPEAL

The points upon which cross-appellant intends to rely on this cross-appeal are as follows:

1. The District Court erred in finding that defendant, the Honolulu Plantation Company, did not have such a property interest in the land held by it under the Damon title as to entitle it to just compensation by way of severance damages under

the 5th Amendment of the Constitution of the United States.

2. The District Court erred in not finding that defendant, the Honolulu Plantation Company, was entitled to just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

3. The District Court erred in not awarding the Honolulu Plantation Company the amount of \$595,010 as just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

4. The District Court erred in not awarding said defendant the amount of \$1,035,185 as severance damages.

HONOLULU PLANTATION
COMPANY,

By /s/ C. NILS TAVARES,
Its Attorney.

Of Counsel:

PRATT, TAVARES &
CASSIDY.

[Endorsed]: Filed March 15, 1948.

[888]

[Title of District Court and Causes.]

**DESIGNATION BY CROSS-APPELLANT OF
ADDITIONAL PORTIONS OF RECORD ON
APPEAL**

The Honolulu Plantation Company, cross-appellant and appellee in the above consolidated proceedings, designates the following matters to be included in the record on appeal in addition to the matters designated by the appellant.

1. Honolulu Plantation Company's Notice of Cross-Appeal.
2. Statement of points on which cross-appellant intends to rely.
3. Government's Order Extending Time to Docket Record on Appeal.
4. Honolulu Plantation Company's Order Extending Time to Docket Record on Appeal.
5. This Designation.

**HONOLULU PLANTATION
COMPANY,**

By /s/ C. NILS TAVARES,
Its Attorney.

Of Counsel:

**PRATT, TAVARES &
CASSIDY.**

[Endorsed]: Filed March 15, 1948.

[892]

[Title of District Court and Causes.]

STIPULATION

Whereas by Orders of Consolidation dated February 17, 1945, and November 22, 1946 respectively, the above entitled cases were consolidated, and upon the trial thereof, a single finding was made of severance damages and one judgment entered for the said consolidated cases; and

Whereas the United States of America has filed Notice of Appeal in said consolidated cases, and the Honolulu Plantation Company has filed Notice of Cross-Appeal in said consolidated cases;

Therefore It Is Stipulated and Agreed by and between the United States of America by W. Braxton Miller, Special Assistant to the Attorney General, and the Honolulu Plantation Company by its attorneys, Pratt, Tavares & Cassidy, that said Orders of Consolidation shall continue in full force and effect to the final disposition of said consolidated cause in the appellate courts, that but one appeal be prosecuted in said consolidated cases, that one bond for costs on Cross-Appeal be filed, that a single record be printed, and that all orders, courts be similarly consolidated and effective as single orders, judgments and mandates, fully ef-

fective and applicable to all of the cases so consolidated as one cause.

Dated Honolulu, T. H., this 18th day of March, 1948.

UNITED STATES
OF AMERICA,

By /s/ W. BRAXTON MILLER,
Special Asst. to the Atty. Gen.

HONOLULU PLANTATION
COMPANY,

By PRATT, TAVARES &
CASSIDY,

By /s/ C. NILS TAVARES,
Its Attorneys.

[Endorsed]: Filed March 19, 1948. [896]

[Title of District Court and Causes.]

ORDER

Now this 19th day of March, 1948, there appearing the United States of America, by W. Braxton Miller, Special Assistant to the Attorney General, and the Honolulu Plantation Company, by its attorneys, Pratt, Tavares & Cassidy, and it appearing to the Court that said parties have entered into and filed a stipulation herein pertaining to the appeal of the above entitled cases, and it further appear-

ing that said cases have heretofore been consolidated by orders dated February 17, 1945, and November 22, 1946 respectively, and good cause therefor appearing,

It Is Hereby Ordered that said Orders of Consolidation shall continue in full force and effect to the final disposition of said consolidated cause in the appellate courts, that but one appeal be prosecuted in said consolidated cases, that one bond for costs on Cross-Appeal be filed, that a single record be printed, and that all orders, judgments and mandates made by said appellate courts be similarly consolidated and effective as single orders, judgments and mandates, fully effective and applicable to all of the cases so consolidated as one cause.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
District of Hawaii.

[Endorsed]: Filed March 15, 1948.

[900]

[Title of District Court and Causes.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Honolulu Plantation Company, a California corporation, authorized to do business in the Territory of Hawaii, as principal, and Columbia Casualty Company, a New York corporation authorized to do business in the Territory of Hawaii, as surety, are held and firmly bound unto United

States of America, petitioner above named, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said United States of America, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and Sealed with our seals and dated this 13th day of March, 1948.

Whereas on November 5, 1947, in an action in the United States District Court for the Territory of Hawaii, between United States of America as petitioner and Honolulu Plantation Company as defendant, a judgment was rendered, a portion of which disallowed just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by said defendant under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant, and the said defendant having filed a Notice [904] of Cross-Appeal from such portion of said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if the said defendant shall prosecute its cross-appeal to effect and shall pay costs if the cross-appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounded princi-

pal and surety have caused these presents to be duly executed this 13th day of March, 1948.

(Seal)

HONOLULU PLANTATION
COMPANY,

By /s/ P. E. SPALDING,
Its Vice-President.

(Seal)

COLUMBIA CASUALTY CO.,

By /s/ F. K. GILLIS,
Its Attorney-in-Fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 13th day of March, 1948, before me appeared Philip E. Spalding, to me personally known, who being by me duly sworn, did say that he is the Vice-president of Honolulu Plantation Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Philip E. Spalding acknowledged said instrument to be the free act and deed of said corporation.

(Seal)

/s/ W. H. FULLAWAY,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires 3/21/49.

[905]

Territory of Hawaii,
City and County of Honolulu—ss.

On this 13th day of March, 1948, before me personally appeared Kenneth Gillis, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of Columbia Casualty Company, duly appointed under power of attorney dated the 8th day of October, 1947, which power of attorney is now in full force and effect and that the foregoing instrument was executed in the name and on behalf of said Columbia Casualty Company by said Kenneth Gillis as its attorney-in-fact; and said Kenneth Gillis acknowledged said instrument to be the free act and deed of said Columbia Casualty Company.

/s/ W. H. FULLAWAY,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires 3/21/49.

Approved as to form and sufficiency of surety.

(Seal) /s/ W. BRAXTON MILLER,
Special Assistant to the Attorney General of the
United States.

/s/ J. FRANK McLAUGHLIN,
Judge of the above entitled Court.

[Endorsed]: Filed March 19, 1948.

[906]

[Title of District Court and Causes.]

ORDER FOR TRANSMITTAL OF
ORIGINAL EXHIBITS

Upon motion of the United States of America
appellant and Honolulu Plantation Company,
Limited, appellee and cross appellant and good
cause appearing therefore,

It is hereby ordered that the Clerk of this court
is authorized and directed to transmit to the Clerk
of the United States Circuit Court of Appeals for
the Ninth Circuit, together with the transcript of
record on appeal, all of the original exhibits of-
fered in evidence and all of the original exhibits
received in evidence at the trial of this cause with
a request that the Clerk of the Circuit Court of
Appeals return said original exhibits to this Court
upon the rendition of final decision in the Circuit
Court of Appeals.

Dated Honolulu, T. H., this 7th day of July,
1948.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
District of Hawaii.

[Endorsed]: Filed July 7, 1948.

[910]

[Title of District Court and Causes.]

REPORTER'S TRANSCRIPT OF RECORD

Mr. Vitousek: I'd like to call Mr. S. L. Austin.

STAFFORD L. AUSTIN,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. What is your name?

A. Stafford L. Austin. [1172]

Q. And what is your position?

A. I am Vice-President, C. Brewer and Company.

Q. Mr. Austin, there has been placed in evidence in this case as Exhibit 4-B a power of attorney from Honolulu Plantation Company, P. E. Spalding, S. L. Austin and/or H. T. Kay—are you the S. L. Austin named in that power of attorney?

A. I am.

Q. How long have you been in your present position with C. Brewer and Company?

A. Oh, since September, 1944.

Mr. Driver: When?

The Witness: September 1, 1944.

By Mr. Vitousek:

Q. Prior to that date, what were you doing?

A. I was Manager of Honolulu Plantation Company.

(Testimony of Stafford L. Austin.)

Q. How long had you been Manager of the Honolulu Plantation Company?

A. Since July 1, 1939.

Q. And prior to July 1, 1939, what were you doing?

A. Manager of the Wailuku Sugar Company.

Q. And where is Wailuku Sugar Company?

A. On Maui.

Q. This Territory? A. This Territory.

Q. And how long were you Manager of the Wailuku Sugar [1173] Company?

A. From February 1, 1932, to July 1, 1939.

Q. Prior to becoming Manager of the Wailuku Sugar Company, what were you doing?

A. I was Assistant Manager at Honolulu Plantation Company.

Q. How long had you been Assistant Manager?

A. I was Assistant Manager for three, a little over three years.

Q. And before that?

A. I was Division Overseer at Honolulu Plantation.

Q. And do you recall how long you were Division Overseer?

A. From about half and half—three years Division Overseer and three years Assistant Manager before I went—

Q. And were you with the plantation prior to becoming a Division Overseer for the Honolulu Plantation?

(Testimony of Stafford L. Austin.)

A. No, I was at the Hilo Sugar Company before that.

Q. What were you doing in Hilo Sugar Company?

A. I was Division Overseer at Hilo Sugar Company.

Q. Do you recall about how long you were in that position?

A. I was Division Overseer at the Hilo Sugar Company for approximately four years, and before that a luna in the various capacities on the plantation.

The Court: At Hilo Sugar?

The Witness: Hilo Sugar, yes. [1174]

Q. Did you start in the sugar work in the sugar industry in the Hilo Sugar?

A. No, prior to that I was at Waiakea on the Island of Hawaii.

Q. Did you attend college? A. I did.

Q. What were your major subjects?

A. Agriculture.

Q. Agriculture? And since leaving college can it be stated you have been with the sugar industry of Hawaii up to the present time?

A. That's a correct statement.

The Court: Is there some mystery about this college?

Mr. Vitousek: No.

The Court: What is it?

The Witness: Cornell.

Q. And where else?

(Testimony of Stafford L. Austin.)

A. University of Georgia.

Q. Mr. Austin, referring now to the Honolulu Plantation—I'll withdraw that question. What in general are your duties as Vice-President of C. Brewer and Company?

A. Well, as Vice-President of C. Brewer and Company I handle the plantation operations on all the plantations that they are agents for, being 12 in number.

Q. Well, Brewer and Company have a plantation department? [1175]

A. They have a plantation department and I am in charge of the plantation department.

Q. You are in charge of the plantation department? A. Yes.

Q. Since you left the Honolulu Plantation as Manager and became Vice-President of Brewer and Company has your work brought you in contact with the Honolulu Plantation? A. It has.

The Court: You will have to speak a bit louder.

The Witness: It has.

Q. And frequently or infrequently?

A. Frequently.

Q. Now, Mr. Austin, how many plantations are in the plantation department? In other words, how many plantations C. Brewer and Company are agents for? A. Twelve.

Q. Throughout the Territory?

A. Throughout the Territory.

Q. Honolulu Plantation is located where on this island?

(Testimony of Stafford L. Austin.)

A. At Aiea in the District of Ewa.

Q. That's sugar cane land it operates? Do you know the character of those holdings in general, fee or leasehold?

A. A part in fee and part in leasehold.

Q. Well, which is the greater part?

A. The greater part is in leasehold. [1176]

Q. What would it be characterized, in what way, what type of plantation?

A. An irrigated plantation.

The Court: Is there any other type in Hawaii?

The Witness: Unirrigated.

The Court: Which one is that?

The Witness: Well, all the plantations where they have no irrigation system.

Q. What are some of those?

A. On the Island of Hawaii—

Mr. Rathbun: Nature furnished it?

The Witness: Yes.

The Court: Rain.

Q. Now, the Honolulu Plantation has a mill, has it not? A. It has.

Q. Does it produce only raw sugar or produce other sugar?

A. It produces raw and refined.

Q. It produces both raw and refined?

A. Both.

Q. Is the processing carried on in one mill structure?

A. Processing is carried on under one mill roof. It is a process of moving from the raw right into

(Testimony of Stafford L. Austin.)

the refined without moving from one building into another.

Q. Now, I will ask you, Mr. Austin, for the purposes of this record, to described in general the properties acquired [1177] and particularly those used by the Honolulu Plantation Company comprising a sugar plantation?

A. Well, I will have to—

Mr. Rathbun: At this time, if your Honor please, I want to note an objection. This line of testimony on anything other than the cases involved here, the 13 cases, is wholly immaterial as far as anything appears.

The Court: Your objection may be noted and your exception may run to the line.

By Mr. Vitousek:

Q. Mr. Austin, in this last question I didn't mean to detail it. I mean in general what is necessary, property necessary in operating a plantation.

Mr. Rathbun: Just a minute. That calls for a conclusion. I object to it for that reason. If he wants to describe the property and the Court rules he can, that's different.

The Court: As I understand it, this question is different from the first. This is a general question asking him to describe in general terms what lands are needed to operate a sugar plantation, I presume in Hawaii and on this island.

Mr. Vitousek: No, that isn't the purpose of the question; the land, mill, and so on, what is necessary all together.

(Testimony of Stafford L. Austin.)

The Court: Anywhere?

Mr. Vitousek: Then we'll get into detail.

The Court: Anywhere? [1178]

Mr. Vitousek: On the Island of Hawaii and particularly the Honolulu Plantation.

The Court: Well, let's have the general first and follow it by specific. Do you have it in mind?

Mr. Rathbun: I do. But may I have this objection, without objecting specifically that objection will run?

The Court: That's right, together with an exception.

Mr. Rathbun: To no materiality other than to suits involved in this case?

The Court: That's right. And your exceptions will follow.

The Court: (To the witness.): Do you know the question? Do you know what you are being asked?

The Witness: Yes, I think I do.

The Court: All right.

A. In order to start a plantation it is necessary to have first land; then to have a—if it is an irrigated plantation, it is necessary to have a pumping plant, pipe lines, ditches, housing for you men, a mill, and all the facilities necessary to operate a mill; and the other tools, implements, and other paraphernalia that may be necessary to do all the weeding and cultivating of the land.

Q. Well, what about transportation of cane?

A. It would be necessary to have transportation facilities of one kind or another to get the cane to the mill.

(Testimony of Stafford L. Austin.)

Q. In coming to the mill, now, the mill that you described [1179] where the cane is processed into sugar, what in general is the plant required to accomplish the processing of sugar cane into sugar?

A. It is necessary to have first the carriers into the mill. Then you have a set of maybe 12, 9 to 12 rollers to mill, to grind up the cane. It would be necessary to operate this mill, turn it over. Then the pumps and equipment to pump the juice to the heaters; and the filters, to filter out the mud and debris; then you have the quadruple effects where you boil the juice and boil off the water and gradually get the massecuite, which is made up of both sugar and molasses. We have the vacuum pans where you make the sugar for the raw sugar and then for the low grade. We have centrifugals so that you can get to separate the molasses from the sugar. And in the case of the refinery you have your filters for filtering the raw juice and the centrifugals for processing the sugar, dryers, bagging equipment, and warehouse for warehousing the finished product; railroad system or trucking system to move the sugar from the warehouse to the port. Usually in the mill they have their own electrical plant for making their own electricity.

Q. Well, in order to get this more particularly, I will ask a question which may sound leading, if the Court please, but it is preliminary. Is the equipment that is the property of the Honolulu Plantation that generally used except for the [1180] fact that it refines white sugar for other plantations in the Territory?

(Testimony of Stafford L. Austin.)

A. It is generally used.

Q. Would then the general description you have given of the mill apply to the mill of the Honolulu Plantation? A. It does.

Q. Starting back at the land in the Honolulu Plantation Company, how long does it take to grow cane and produce the proper cane to be **processed**, sugar cane.

A. Anywheres from 18 to 14—anything over 20 to 24 is good. Anything less than that, we try not to get the age of cane any less than 18 months anyway.

Q. Well, then, after the first crop is produced, you produce other crops from root structure?

A. Ratoon crops from the same.

Q. How many?

A. Sometimes three, sometimes four, depending on the location, the kind of variety of cane and how well it grows.

Q. How long does it take to produce a ratoon crop from the time of the cutting to the next crop?

A. Relatively the same age.

Q. Relatively the same?

A. Yes, 18 to 24 months.

Q. How do you arrange so that you can produce a crop of cane for milling each year? [1181]

A. Well, you divide up your land, and usually you take about two-thirds of the land per year for crop. You have what they call a long crop and a short crop. And the short crop is the crop that is taken from, that you take off the first part, off the first part of the

(Testimony of Stafford L. Austin.)

year, and then take off at the last part of the year, of the following year, which gives it the 18 months or 20 months growth. And every two years then you have a crop coming on. In other words, in different areas. You divide up your land so that you have so much coming off each year.

Q. You cannot crop, then, each year the whole area that you would call cane land?

A. No, you can't. And you have to keep your crops in balance all the time so that you get a relatively same amount of sugar off each year.

Q. Now, you have described the mill and coming to the Honolulu Plantation Company in particular—I'll withdraw that. Mr. Austin, I show you Exhibit 3 which was introduced in evidence in this case. Have you seen that before? A. I have.

Q. And what in general does that show?

A. This shows the Honolulu Plantation Company from the land standpoint as a whole. It shows the ditch system, the pumping system, and the area of cane land.

Q. Well, would you describe in more detail the pumping [1182] system, how it is operated, the irrigation system, how it is operated, the two together, describe it in your own words?

A. Well, from the standpoint of the Honolulu Plantation Company?

Q. Yes. And you can use this exhibit that I have handed you.

A. On the left of this map here there is shown a pumping plant. That's the Waiau station.

(Testimony of Stafford L. Austin.)

Q. Well, that has underneath it the wording "Waiau Station?"

A. That's right, Waiau Station. That's the electric pump in the Hawaiian Electric Waiau Station. Water—26 million gallons of water is picked up there by this pump and is pumped up to the booster station which is 180 feet above the Waiau plant. Twenty-six, that's 26 million. Then 19 million is picked up by that booster and pumped up to a second reservoir. There are two boosters, a booster here and a booster there. (Indicating on map.)

Q. From the Waiau that you pointed to as Waiau Station with a red line running up? A. Yes.

Q. And the first dot is the booster pump, is that the first one you mentioned?

A. That's right. There's 26 million up to that pump, and there's a reservoir here. Nineteen million is picked up [1183] by this booster pump and boosted up to the second booster.

Q. That's also headed "booster pump?"

A. Yes. And then there are 7 million from there up to the reservoir, the last reservoir on that line. Every bit of this land has to be surveyed, and the amount of water required for a certain area worked out, and pumping and pipe line system and ditch system put into effect where the most efficient use of the water can be made on the area in question. The Honolulu Plantation Company has made a survey of the full pumping water requirements and have allocated pumping stations and pumping plants to the various areas that have underground water, and from

(Testimony of Stafford L. Austin.)

these areas water is pumped to the various heights on the plantation. The booster pumps are used on the higher levels to push the water up to 650 foot elevation. That's the highest point at the Honolulu Plantation where water is used, 650 foot level.

These pumps are not only electric pumps but in some cases steam and diesel operated. On the fee simple lands we have a pumping plant which we indicate as pumping plant number 5, which is right in the middle of the town of Aiea. This water is pumped up to 190 feet, which is to a reservoir above the mill. There's a 5-million gallon, 24-hour pump, which pumps the water up to the reservoir. Then there's three domestic water pumps that pump the water up to 230 feet, at which point there's a reservoir, and this water is used for domestic [1184] purposes in the camp. This water is also used for the area above the plantation, and that's Aiea Heights. That's where the people at Aiea Heights get their water.

The mill requires approximately 9 million gallons of water in a 24-hour period.

The Court: Once again?

A. The mill requires approximately 9 million gallons of water in a 24-hour period. Five million is supplied by pump 5.

Q. Just a moment, Mr. Austin. You say pump 5 and have been pointing to what is headed pumping plant? A. Yes.

Q. Could we have a figure five placed there? (Witness writes on map.) You put "5" within the square headed "pumping plant?" A. Yes.

(Testimony of Stafford L. Austin.)

Q. And that's pump 5 that you have been discussing? A. Yes.

Q. Go ahead, Mr. Austin.

A. The remainder of the water was brought in from either pump 3 or at the present time there's a pump 21.

Q. Will you mark pump 3 and pump 21?

A. Well, pump 21 is a new pump in here, which is not shown. (Indicating on map)

Q. Will you point 21 there where you put that red square? [1185]

(Witness writes on map.) All right, now where is 3?

A. Three is here. (Indicating on map)

The Court: Which is the one we saw when we went on view?

The Witness: Oh, that was pump 2.

The Court: Two?

The Witness: And 4. (Writing on map)

Q. Did I interrupt you? Will you continue with your description?

A. Now, on the Halawa side of the plantation, that is, towards Pearl Harbor in the valley, there are two pumping plants, pump 1 and pump 3. In pump 3 there are two electric units, one pumping 7 million gallons to 180 feet, and the other one pumping 9 million gallons to 315 feet. There's a booster pump in the pump 3 line which boosts that water from the 7 million gallon pump to the 315 foot level when there's not enough water being pumped from the 9 million. At pump 1 there's a big pump

(Testimony of Stafford L. Austin.)

that used to pump 29 million gallons of water, 19 from one—correction, 26 million gallons, 19 million from one pump and 7 from another, two units. Those two pumps are out of operation right now, owing to the fact that the land in this area has been taken.

The Court: What did you call those pumps?

The Witness: Number 1. These two pumps?

The Court: The ones you are talking about are out of operation? [1186]

The Witness: Yes, except for the pump that's been placed in there for Navy use when they desire water.

Q. Well, was that placed there after the suits involved here were filed?

A. Yes. This big pump, pump 1, supplied the area known as the Puuloa area. That's down along the main Kamehameha Highway to town. And to the Makalapa crater where there was some cane at one time. The pump 3 pump furnished water for the area which is now known as Red Hill or the Naval storage area, oil storage area. That's on Red Hill.

The Court: That supplied it when you grew cane there? The Witness: Yes.

The Court: But it does not now supply it?

The Witness: No. This whole system of pumps were worked out with a great deal of trouble and a great deal of effort on the part of the plantation to have an efficient pumping system, irrigation system throughout the plantation.

(Testimony of Stafford L. Austin.)

Q. Well, have you described all the pumps?

A. Well, I haven't. Pump 6 is a pumping plant that pumps 7 million gallons of water 180 feet. And that pump is in operation most of the time on a 24-hour basis, 5 days a week. And that water is taken up the ridge to the booster pump where it, the booster pump, carries it up to 650 foot level. That pump gets all its waters from open springs at Waiau. It doesn't take all the water because there's quite a bit of water running [1187] into the ocean there.

Q. You have mentioned these pumps in addition to the pumping plants. Are there any other buildings or dwellings about the pump as forming a part of the unit, operating unit?

A. There's—each one of them, each one of the pumps, has its own pumping building.

Q. And what else?

A. Camp area around it, surrounding it.

Q. What is the camp area used for?

A. For the housing of the people that operate the pumps.

Q. Now, you described the pumps and the pumping to various reservoirs. How is the water distributed to the fields?

A. Through main line ditches; and on a portion of the plantation from the Waimalu Gulch over to the edge of the plantation next to Waipahu the ditches, the main ditches, were concrete, concrete lined.

(Testimony of Stafford L. Austin.)

Q. Well, are there some ditches that are not concrete lined?

A. There are some ditches in this area, in the area on this side of the plantation.

Q. Well, by "this side" you mean, referring—

A. The Honolulu side.

Q. Where would be the Honolulu side, starting from where?

A. From this, from the Halawa Gulch, I mean the Waimalu Gulch. [1188]

Q. Spelled W-a-i-m-a-l-u?

A. Yes.

Q. On the Honolulu side of the Waimalu Gulch?

A. There are some areas where we didn't have any concrete ditches.

Q. And the other side?

A. They were almost all completed as far as the concrete ditches are concerned.

Q. Mr. Austin, you mentioned in your testimony a camp, camp site. Will you give us the general location of the camp sites, the number of buildings, as of the time prior to the first taking involved in these proceedings, 514, which is shown as filed June 21, 1944?

A. I will have to refer to—we have a pump 2, camp with two units, two houses; pump 4, camp with 8; Kalauao camp with 9; Halawa camp with 12; Mango tree camp, 31. Now, Mango tree camp is below the old Moanalua Highway, and is in the Aiea red area.

(Testimony of Stafford L. Austin.)

The Court: One house?

The Witness: No, there's 31. Then the main mill camp is 25. In the new mill camp is 98. In the lower Japanese camp is 90. In the skilled labor camp there's 30. In the main mill camp there's 73.

The Court: Just a minute.

Q. You mentioned two main mill camps, one 25, now you [1189] say 73.

A. Well, one is the main mill; that's below the road, for administrative—

Q. That's for employees in the administrative positions?

The Court: Which one?

The Witness: The main mill camp, 25.

The Court: All right.

A. Then in the new mill camp is—

Q. Wait just a minute. You had one main mill camp, 73. Where is that? And what employees occupy it?

A. Seventy-three, main mill camp is 73.

Q. Yes?

A. Well, that's in the main, in the middle camp just below the mill.

Q. Well, that's different from the 25 you mentioned? A. That's different.

Q. So it's in addition to those?

A. That's right.

Q. All right, go ahead.

A. Then we have a new mill camp, 70, Puerto Rican camp, 41. And on the—there's 11 more; the Mango tree camp on the other side of the road, if

(Testimony of Stafford L. Austin.)

you put that together with the Mango tree, that's 42 in the Mango tree camp.

Q. Well, now, in the new mill camp you gave 98. Now you said 70. Is that in addition to the 98?

A. That's in addition.

Q. That's for a different type of housing?

A. Yes.

Q. Go ahead.

A. Then there are four houses along the Aiea Village along the Government road. There are four houses there. Makalaini camp 16; Aiea stable camp, 18; and below the Government road skilled labor camp 12. That's the total number of houses on the fee area.

Q. Well, was there any sewage system or water system or electric light system for these camps?

A. Well, there was a sewer system in the skilled labor camp, main mill camp, new mill camp. lower Japanese camp, Puerto Rican camp, Mango tree camp, Kalauao camp, pump 2 and 4 camps, and the Makalaini camp. Then the electricity was connected to all of these camps.

Q. And where is that electricity generated?

A. Generated down in the plantation, but on a sort of a dual hook-up with the Hawaiian Electric. In other words, they have a stand-by in case of there was trouble on the Honolulu Plantation Company lines, any trouble in the Honolulu Plantation Company lines, why they have a stand-by with the Hawaiian Electric so that we always have power, electricity.

(Testimony of Stafford L. Austin.)

Q. Well, the sewerage system was installed and maintained by the plantation? [1191]

A. Installed and maintained by the plantation.

Q. How about the domestic water?

A. The domestic water is piped to all the homes. And as I indicated previously that pump 5—three pumps were operated on domestic water alone.

Q. You have described in general the machinery used to operate the mill. How was it housed? What is the character of the buildings in which it is housed? Just give a general description.

A. You have your main mill building, the electric power house, the sugar warehouse, raw sugar bin shed, bag shop, massecuite tank building, molasses tank building, laboratory, shop buildings, locomotive sheds, the yeast plant building, and a number of other small buildings.

Q. What is the type of construction of the mill building?

A. It's steel frame with iron galvanized iron siding.

Q. What type of floor?

A. Concrete floor.

Q. In regard to the machinery housed. For instance, first the rollers, what do you call that? Is that technically a mill? A. A mill, yes.

Q. That consists of the rollers?

A. Each one of those; there's three rollers to one mill.

Q. It's a train of rollers? [1192]

A. Yes, a train. We call it a mill train.

(Testimony of Stafford L. Austin.)

The Court: Train?

The Witness: T-r-a-i-n, yes.

Q. All right, speaking of the mill train, is that a heavy or light piece of machinery?

A. Very very heavy piece of machinery. And it's on very solid foundation.

Q. What type of foundation?

A. Concrete reinforced.

Q. You run this mill train with steam engines?

A. Steam engines, yes.

Q. What type of steam engines?

A. They are called coreless.

Q. Are they heavy? A. Very very heavy.

Q. And how are those—

A. Operated by steam. And they are set on solid foundations of reinforced concrete.

Q. Then steam is furnished from boilers, furnished from boilers? A. Yes.

Q. Just give us the general description of those?

A. Well, those are—they have five sterling boilers that are operated with gas; that is, the refuse that comes from the mill after the juice is all pressed out of the cane, [1193] that's by gas. And that trash goes into the boilers and from it you get enough steam to operate the mill.

Q. All right, now, how are they constructed in general?

A. What they call the sterling boiler, very heavy construction, and they have three drums with tubes in between, each one of those boilers is rated at 650 horsepower motor.

(Testimony of Stafford L. Austin.)

Q. Well, are they separate pieces or imbedded in concrete?

A. They are imbedded in concrete, and three of them are—heavy steel sides. In other words, they have a steel frame; to the steel frame are attached the fire-brick fabrics. And this steel frame is bolted down to solid concrete foundation.

Q. Before the cane gets into the mill train, there's some heavy—I'll withdraw that. There's a washing machine or a place where the cane was washed that we saw when we were out there the other day, is that right?

A. That's right.

Q. What type of construction is that?

A. That's a very heavy construction. It's down imbedded in concrete, reinforced concrete, pit and steel construction above the ground.

Q. You described also vacuum tanks in which the juice from the cane is boiled, is that right?

A. Yes, sir, correct.

Q. And how are these tanks constructed and held in place? [1194]

A. Well, they are standing on very heavy high beams and they are of cast iron construction with copper tubes on the inside.

Q. How about the centrifugals that you mentioned?

A. Well, they have to be on a very solid foundation because there's a great deal of vibration; to keep down the vibration they have to be on a very solid foundation with the frame work of steel, steel fabricated.

(Testimony of Stafford L. Austin.)

Q. Bolted, or how are they fastened to the foundations?

A. They are bolted to the foundation.

Q. Now, the machine shop that you mentioned, what type of machinery is in there?

A. Well, they have some heavy planers and heavy milling machines and drilling machines in there, lathes, all set on very heavy foundations and bolted down to it.

Q. How about the electric generating plant?

A. Electric generating plant is on a solid pedestal that goes down about 10 or 15 feet into the ground.

Q. What is that constructed of?

A. Solid concrete, and it's so done so that—the turbine has to be on very solid ground to keep it from vibrating.

Q. What is the yeast plant building? Does that have machinery in it?

A. That has machinery in it.

Q. What is the character of that machinery?

A. That's the—those are mostly tanks in that portion of the yeast plant.

Q. Heavy or light? What is the nature of it?

A. Some are heavy and some are light. They are not, it's not the same sort of machinery as used in the mills; a little bit on the lighter side.

Q. What is the raw sugar bin that you mentioned? What is the character of its construction?

A. The raw sugar bin is a big steel bin that was erected for the use so that you could haul

(Testimony of Stafford L. Austin.)

bulk sugar. This raw sugar is brought in in trucks and these trucks are backed into the bin and the sugar is dropped into these bins and then carried by conveyer into the mill.

Q. Well, that's for use in refining raw sugar you may buy? A. That's it.

Q. What is the type of that construction?

A. That's very heavy construction, of steel and concrete foundation.

Q. How about the warehouses? Anything inside them or just plain buildings to store sugar?

A. Well, a sugar warehouse will take 10,000 tons of sugar when it's full. At the present moment there isn't much sugar.

Q. Do you have any machinery or equipment in there? [1196] A. In the warehouse?

Q. Yes.

A. Only in the merchandise warehouse they have some machinery, spare parts, for the mill and for use around the factory.

Q. On the date I mentioned, June 21, I believe, 1944, did you have any railroads in use by the plantation?

A. Yes, they were all in use in the plantation.

Q. Describe them in general without giving the details. I don't mean the rolling stock. I am referring to the roads, the rails, the ties, road beds, and so on, trestles, whatever you may use.

A. Well, to every point on the plantation there is a main line, what we call the main line, ran so that as soon as the cane would come off certain

(Testimony of Stafford L. Austin.)

fields and we were harvesting them, we put portable tracking to the fields and the cars would be brought on the fields on the track and on to the main line; and on the main line they would be hauled into the mill. So this main line went all over the plantation.

Q. Well, have you any idea of the total mileage of main line, not the portable track, but the main line constructed railroad?

A. I'm not sure of the figure but I think there was 16 or 17 miles of main line.

Q. Will that include any bridges or trestles?

A. It includes bridges and trestles. Those bridges and trestles were great, big affairs, made of 12 by 12's and 16 by 16 lumber.

Q. Was it necessary to construct any roads throughout the plantation?

A. Well, they had a system of roads throughout the plantation.

Q. Well, describe it in general without giving each road, but give a general description.

A. These roads were run up each one of the ridges and from the main highway up into the fields, and they are usually of dirt construction. But it was necessary to keep them, to machine over them most of the time to keep them from getting full of pit holes. This was done usually once or twice a month in bad—when you are hauling cane over them or in bad weather.

Q. Well, by machine you mean road machinery?

A. Road machinery.

(Testimony of Stafford L. Austin.)

Q. To keep them in condition?

A. In condition, yes.

Q. And what were they used for?

A. Used for transporting fertilizer, men, equipment, around the plantation.

Q. Used in connection with the plantation activities? A. Activities, yes. [1198]

Q. In the camps that you have described were any roads constructed?

A. In every one of our camps we had roads running between houses, and all our camps were laid out with roads, necessary roads for easy access to the housing.

Q. Was it necessary to use any drainage system, construct any drainage?

A. Well, culverts and drains were necessary, the same as they are necessary in the city where they have any amount of run-off, especially at the Honolulu Plantation where you have the plantation situated on more or less of a hill.

Q. Did you have a hospital?

A. We had a hospital, yes.

Q. Why did you have a hospital? What was the purpose of it?

A. To take care of the health needs of the plantation people.

Q. Used in plantation activity?

A. In plantation activity, yes.

Q. Do you know the number of beds, the general size of the hospital? A. Thirty-six beds.

Q. Thirty-six bed hospital? A. Yes.

(Testimony of Stafford L. Austin.)

Q. Any other buildings used in connection with the [1199] operations of the plantation? Did you have a club house? A. We had a club house.

Q. Where was that?

A. A gymnasium. We had a club house in the Filipino camp, a club house in the skilled camp, and a big gymnasium in the upper camp.

Q. Well, what were the purposes of those?

A. For recreational facilities and to help entertain and keep the people on the plantation.

Q. That is, the people employed on the plantation?

A. The people employed on the plantation.

Mr. Vitousek: If the Court please, I think this would be a convenient time to adjourn. We are going on into another subject which will take longer than the 15 minutes left.

The Court: Well, we might as well start it and utilize the time.

Mr. Vitousek: All right.

The Court: We might as well have this matter now as later.

By Mr. Vitousek:

Q. Do you have an office building in the plantation?

A. We have an office building which houses all the branches of the plantation work such as general office work, surveying department, the agricultural department, and all the administrative heads of the plantation. [1200]

(Testimony of Stafford L. Austin.)

Q. Now, before the lands involved in these takings were taken from the plantation, do you know the number of acres in cane, or rather the number of acres of cane land?

A. Approximately 4,300 acres.

Mr. Rathbun: Just a minute. In all of what taking, may I ask?

Mr. Vitousek: Involved in the takings in this case.

Mr. Rathbun: In this case?

Mr. Vitousek: I said before the takings, the lands taken involved in these cases.

Mr. Rathbun: I don't think he means that. That wasn't 4,300 acres.

Mr. Vitousek: Yes. (Showing a document to Mr. Rathbun).

Q. By cane area or cane land, what did you refer to?

A. I mean area in which cane was planted. In other words, where we had cane actually growing.

Q. Well, you explained the system of ratoon-and planting cane. Is there any time that land might be idle?

A. Well, there may be some time when the land is idle, between the time you take the cane off for the last ratoon and the time you plant it again.

Q. You mean, then, land used by the plantation?

A. As cane land.

Q. Producing cane? A. That's right.

Q. I mean directly growing cane.

A. That's right.

(Testimony of Stafford L. Austin.)

Q. Now, in addition to the cane land, as you referred to it—

Mr. Rathbun: Just a minute. I fear that now he's gotten off the subject of physical improvements. Before we close I might renew my objection on this subject now of cane land, the same objection I made. It has no materiality whatsoever in this case.—

The Court: Same ruling.

Mr. Rathbun: —on the 13 that are now on trial, no materiality other than—

The Court: Same ruling and same exception.

Mr. Rathbun: And the same preservation of the objection?

The Court: That's right.

By Mr. Vitousek:

Q. Now, Mr. Austin, in addition to the cane lands that you mentioned, were there any other lands required in operating the Honolulu Plantation?

A. Yes, other lands such as camp sites and mill site, reservoir sites, roads, ditches and pump sites.

Q. Are those lands necessary to operate?

A. Operate a plantation.

Q. I show you, Mr. Austin, Exhibit 7, which shows the taking, as the testimony shows from the report of the Honolulu [1202] Plantation, December 31, 1944; that would show the land after the takings involved in the suits now on trial, would it not? (Showing a document in evidence to the witness.)

A. That would, about 3,309 acres of cane area.

(Testimony of Stafford L. Austin.)

Q. Now, this shows other areas, buildings and camp sites, reservoirs. (Showing another document in evidence.) Now, you have one headed "Pine, Vegetable and Pasture." What does that mean?

A. There was some area that was leased out to the pineapple growers, and there was an area that was used by the plantation employees for vegetable gardens.

Q. That's to grow household vegetables?

A. That's it, for their own use.

Q. Then roads and railroads shows how much?

A. One hundred seventy-three, approximately 173 acres.

Q. Miscellaneous and waste, generally what was the character of the acreage shown under that heading?

A. Gulches and sides of hills and places that we couldn't raise sugar cane.

Q. How about forest? A. And forest.

The Court: I think we can stop now. We have used the 10 minutes. All right, we will adjourn at this time until Monday.

Mr. Vitousek: Nine o'clock?

The Court: At nine.

(The Court adjourned at 12:30 o'clock, p.m.)

Honolulu, T. H., December 9, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: As we start the second week, are the parties ready?

Mr. Vitousek: Ready, if the Court please.

The Court: All right. Mr. Martin, you are still under oath. As we adjourned you were discussing with the witness in the form of question and answer the subject of lands before and after taking.

Mr. Vitousek: Yes, if your Honor please.

STAFFORD L. AUSTIN,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Direct Examination
(Continued)

By Mr. Vitousek:

Q. Mr. Austin, in connection with the lands held by the Honolulu Plantation and used by it in conducting the plantation enterprise, would you state whether or not these lands were contiguous?

A. They were. [1204]

Mr. Rathbun: Just a moment. That calls for a conclusion, if your Honor please, as to the facts.

Mr. Vitousek: I don't think that calls for a conclusion. That's a physical fact.

Mr. Rathbun: Well, it's a conclusion from the facts to tell where they are. That's how to prove it. It might be a legal question.

The Court: There is a legal question mixed up in it. I think it would be better if the answer goes out and he describes the land as such.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: All right, if the Court please.

The Court: And adduce it from the facts.

By Mr. Vitousek:

Q. Mr. Austin, I show you Exhibit No. 1 introduced in this case. (Showing map in evidence to the witness) What does that exhibit show in general?

A. It shows the area comprising the Honolulu Plantation Company properties.

Q. Now, this exhibit has been the subject of other testimony. It shows the area colored in pink or red, land involved in these takings; the lines, previously taken before this suit was filed; in green, the fields of the company.

The Court: Not taken.

Mr. Vitousek: Not taken.

Q. Now, Mr. Austin, some of these lands were held as [1205] leaseholds, were they?

A. They were, yes.

Q. And in relation to the total area used by the plantation, what was the amount of land held under leasehold? Was it large or small?

A. Large. It was known as a leasehold plantation.

Q. Now, in the land shown on the map in white, in between these cane fields, will you describe in general the character of such lands commencing, say, with field 60, 61 and 62, and proceeding towards the Ewa side of the plantation?

A. Well, this is—

Q. No, fields 60, 61 and 62.

(Testimony of Stafford L. Austin.)

A. This area in here? (Indicating on map referred to.)

Q. Yes. That's 57 you're pointing to?

A. Yes, that area, 57, was a portion of fee simple land. All this is owned by the Navy, Navy lease.

Q. Navy lease? A. Yes.

Q. Leased to the Navy?

A. No, it was leased from the Navy to the Honolulu Plantation Company and subsequently taken over by the Navy for their own purpose.

Mr. Rathbun: I can't hear this at all.

The Court: I wondered if you could. You will have to speak louder. [1206]

A. Fifty-seven is about 30 acres there of Navy land that was taken back by the Navy and it was leased to the plantation at one time and the lease was cancelled.

Q. All right. Now, the area below that.

A. The area below that is plantation camp, camp areas.

Q. Camp areas?

A. Right down to the bay, the Kam highway.

Q. Between fields 48, 49, 50 and 76 and 45, 43 and 44 and 75, what is that area in white, what kind of land?

A. That's gulch land, steep slopes and a stream at the bottom.

Q. Is that fee simple or leasehold?

A. Leasehold.

Q. Held by the plantation?

A. Held by the plantation.

(Testimony of Stafford L. Austin.)

Q. And the next area in white? That's between 41, 43, 44 and 30, 31, 34.

A. That's known as the Waimalu Gulch and stream and that was held by the plantation leasehold.

Q. Now, there is some white area shown in 26 and 28. What is that area?

A. Those are gulch sides and small stream, branch stream from the Waimalu Gulch.

Q. And that is fee simple, leasehold or what?

A. Leasehold. [1207]

Q. Held by? A. Held by the plantation.

Q. Now, the area shown in green on the map, the fields. A. Plantation cane fields.

Q. And how were they held?

A. In leasehold with the exception of a few acres above the mill, which was fee simple.

Q. And the area shown in pink or red, being the areas involved in these suits, how were they held? A. Those were held in leasehold.

The Court: Just a minute on that point. Were all of the areas marked on that map in red prior to the taking totally utilized for the growing of cane?

Q. Will you answer that question?

A. They were, your Honor.

Q. Now, Mr. Austin, will you keep that Exhibit 1 before you, please. Referring you to fields 81 to 89, the pink areas—

The Court: Inclusive?

Q. —inclusive. What was the character of the land in those fields?

(Testimony of Stafford L. Austin.)

A. Well, it's level area comprising what we termed good cane land. The reason for terming it good cane land is because we usually got good output of sugar from those fields.

Q. How about the soil?

A. The soil was good cane land soil. The depth of the [1208] soil was enough to raise a good crop of cane.

Q. Will you state, its general level land?

A. Yes.

Q. How about irrigation in these fields, how was that accomplished?

A. By pump water from pump 1 in the Halawa Gulch.

Q. Was it a high or low lift?

A. Low lift pump, pumped to about a 76-foot head.

Q. Now, I refer you on the same exhibit, Exhibit 1, to fields 91 and 107. What was the character of the soil in the lands involved in these fields?

A. Very level land, and they produced good crops of cane, 91 specially good and tapering off a little at 107.

Q. And how were these fields irrigated?

A. Irrigated with water from the same pump, pump 1.

Q. High or low level?

A. Low level, low lift.

Q. Low lift?

The Court: Excuse me, when you say "low lift" you refer to the pumps' capacity?

(Testimony of Stafford L. Austin.)

Q. Will you explain, Mr. Austin, what you mean?

A. No, the elevation to which the water is pumped. A low lift pump, we say that's low lift because it only pumps 76 feet. We have pumps that we showed you on the Waimalu Gulch that pump 415 feet. And 76 compared with 415 is a low [1209] lift.

The Court: So in order to get the water to this land it only has to go up 76 feet?

The Witness: Yes.

Q. Now, Mr. Austin, going towards Ewa, still referring you to the same Exhibit 1, will you describe fields 61 and 62 and a portion of 56 colored in red on this map, as to the character of the soil?

A. This is all deep red soil and very good land for producing cane. We get good crops from all these fields and they were more or less level with a few gullies in it down by the main highway. Otherwise easy to cultivate and produce good crops.

Q. How were these fields irrigated?

A. These fields were irrigated from pump 3, from pump 3, 180-foot level.

Q. Eighty?

A. One hundred eighty foot lift. And some of the water was below the mill; the water that went through the mill was used again on the cane fields for irrigation purposes. In other words, it was—water was used in the mill and then it moved from the mill into the fields.

Q. Without pumping?

(Testimony of Stafford L. Austin.)

A. Without pumping.

Q. Without further pumping? [1210]

A. Without further pumping.

Q. At present what do you do with the water from the mill?

A. It runs to—there's only about a hundred acres that can come under that water now. The rest of it goes into the stream.

Q. Wasted? A. Wasted, yes.

Q. Proceeding further—

The Court: Excuse me. Where is part of 56?

The Witness: There. (Indicating on map.)

The Court: Oh, all right.

Q. Proceeding further Ewa, Mr. Austin, first in confining your testimony to fields 5, 4, 6 and 7, colored in red on Exhibit 1, will you describe the character of the soil?

A. Very excellent soil, deep in red color. In the red soils of Waimalu section we grew heavy cane and got good yield. That land was nearly all level in nature with a few gullies down by the main highway.

Q. How was the land, or rather how were the fields irrigated?

A. Those fields were irrigated from the water pumped, by the water pump from the Waiau station at Hawaiian Electric, and that water went through concrete ditches and was distributed to that area by these main concrete ditches. [1211]

Q. Well, what was the lift? Was there more than one lift for the irrigation of these fields?

(Testimony of Stafford L. Austin.)

A. Well, this water was not too high lift. That was first—the first reservoir, which is about 180 or 90 feet—about 104 feet there.

Q. And is there another reservoir?

A. There is a reservoir, a big reservoir right above the Waiau camp, Waiau pump.

Q. Well, how were the lands above this ditch shown on the map irrigated, that portion of the red area? A. Oh, above that main ditch?

Q. Yes.

A. Well, there's another main line ditch coming across there that irrigated this area, and all from the same source, however.

Q. That's the main line ditch shown in green running through fields 8 and 3?

A. Yes, there was a secondary reservoir and from that reservoir the water was transmitted to the fields to that area by concrete ditch.

Q. As the indication on this Exhibit 1, this map of a ditch through fields 3 and 8, that portion of those fields shown in green, the ditch was used partly to irrigate fields?

A. The top of field 7.

Q. And what other field? [1212]

A. Four, the top of 4.

Q. Now, calling your attention to this same map, to the areas in red on fields 1—there are four different areas there under a heading "Civil No. 533." What was the character of those portions of lands?

A. There was gulch bottom and alluvial wash

(Testimony of Stafford L. Austin.)

from the gulch sides, which was very rich and produced very excellent cane.

Q. Were these fields irrigated?

A. Irrigated, yes.

Q. How were these fields irrigated?

A. Well, from the same source, but on a higher takeoff from that Waiau pipe line. And the ditch ran right straight across the plantation at a higher level. It says "reservoir" on the top of 15, across there all the way over to the gulch and from the gulch down into these fields. Field 1, the low half of field 1 was irrigated partially from the same ditch that irrigated the top of 7 and 4.

Q. Do you know whether or not there are any lands available that could be used by the plantation to grow cane other than those being now utilized?

A. There is no land excepting a small area on ridges above the present plantation irrigation system, 650-foot level.

Q. What is the character of these lands on the ridges?

A. Well, there is no water on the area and we experimented [1213] in raising cane up there, 114 acres of land planted up in that area, but finally had to give it up as being too expensive to operate, to keep going.

Q. You have described here in the course of your testimony on Friday and today various properties of the plantation, the mill, pumps, land, ditches, and so on. Were those all used in the growing of sugar cane and processing the sugar raw and refined?

(Testimony of Stafford L. Austin.)

A. They were, excepting the yeast plant that I explained. That was for the purpose of making yeast. But it used a by-product as a base, was used—

The Court: What was this yeast plant, something erected during the war?

The Witness: That was a war baby.

The Court: You don't use yeast at all in making sugar?

The Witness: No.

Q. Well, were all these properties necessary for the purpose of growing cane other than the yeast plant and the processing of the same into sugar?

A. They were, that's right.

Q. You mentioned that this plantation was called a leasehold plantation. What can you say regarding the leasing of land for the growing of cane generally throughout the Territory and particularly this island? Is it a practice?

A. Well, it's a general practice to lease land for the [1214] purpose of raising cane for production of sugar on a plantation.

Q. Are there other leasehold plantations?

A. Oh, a great number. It's the general practice throughout the Territory to lease land for raising cane.

Q. A number of leases have been introduced in the record here, most of them showing execution of the larger areas around 1936. Were you familiar with them at the time these leases were executed?

A. Yes, I am. I know about the leases and when they were executed.

(Testimony of Stafford L. Austin.)

Q. They were for lands previously held under lease in the same owners? A. They were.

Q. Now, what was done by the plantation after securing the leases in the nature of improvements, just generally? I don't mean specifically.

A. Well, in the next three years after 1936, approximately \$1,325,000 was spent on new improvements such as ditches, camp improvements, and the like.

Q. You testified, Mr. Austin, in part that part of this mill plant was used for processing white sugar from raw sugar. Did the plantation purchase raws for the purpose of making white sugar?

A. It was necessary for the plantation to purchase raws for processing through the refinery in order to keep up with [1215] the demand for refined sugar in the Territory.

Q. Before the war emergency did the plantation purchase raw sugar to make white sugar?

A. In the Waimanalo Sugar Company and for a short time from Kaeleku Sugar Company.

Q. Where is that located?

A. Hana, Maui.

Q. Is that in business now or out of business?

A. No, that's defunct.

Q. Used for a dude ranch? A. Yes.

Q. Now, Mr. Austin, during the war emergency were raws made available from other sources?

A. They were made available from California and Hawaiian.

Q. Why?

A. Due to the need for a substantial increase

(Testimony of Stafford L. Austin.)

in the amount of refined for the purpose of taking care of the military forces in this area and to the south.

Q. The Navy also? A. Navy, yes.

The Court: Made available by California and Hawaiian?

Mr. Vitousek: Yes, I'm going to have that explained, if the Court please.

Q. What is the California and Hawaiian as you called it?

A. The California, C. & H. as it is shortly known, is [1216] a refinery owned by a number of plantations operating in the Hawaiian Islands. The raw sugars are contracted to C. & H. and shipped from here to C. & H. where it is refined for the general market on the mainland.

Q. Where is the mainland refinery?

A. At Crockett, California.

Q. California. Now, without the war emergency, the war emergency being over, are there any available places to purchase raw sugar in the Territory for use in Aiea?

The Court: Excuse me, I didn't get that.

(The reporter read the last question.)

A. The only available place now is Waimanalo, Waimanalo Sugar Company.

Q. Is there a sufficient quantity? What is the quantity available from the Waimanalo?

A. About 4,000 tons now.

Q. Coming back, Mr. Austin, to the plantation mill which you described Friday, used to make

(Testimony of Stafford L. Austin.)

raws out of sugar cane and also white sugar, what was the mill constructed output, that is, what was the tonnage that could be manufactured by that mill as constructed originally?

A. You mean from the cane?

Q. From cane. A. From cane?

Q. Yes. [1217]

A. A little over 30,000 tons, from 30 to 35 thousand tons.

Q. And what amount of tonnage of white sugar can be manufactured by that mill as originally constructed? A. In excess of the 30.

Q. The total including the 30?

A. Oh, including the 30, 40 to 45 thousand tons.

The Court: Let's go back over that. I don't get that.

By Mr. Vitousek:

Q. Mr. Austin, we were out and viewed this mill the other day and you described the mill. It had two operations, did it not, one manufacturing raw sugar? A. That's right.

Q. And also manufacturing white sugar?

A. That's right.

Q. Now, the raw sugar was manufactured from putting cane in, start washing it, and so forth, and taking it through the mill ending up in raw sugar. Now, what was the capacity of the mill as originally constructed to make raw sugar from cane, from sugar cane?

A. Thirty to thirty-five thousand tons.

Q. Then you described it, the raws were re-

(Testimony of Stafford L. Austin.)

melted and put through another process, made into white sugar? A. That's right.

Q. Now, the making of the white sugar from raws—what [1218] was the capacity of the white sugar in part of the plant to make white sugar from raws?

A. Forty to forty-five thousand tons. That's the original layout as we had it.

Q. And you were able to take raws from other plantations, put them into the process, and make white sugar from those raws?

A. They are what we call outside raws, purchase of outside raws.

Q. And that's what you described the sugar bins the other day, they were sugar bins used for that purpose? A. That's right.

Q. Now,—

The Court: Excuse me, I'm going to ask a question. This raw sugar that you buy from Waimanalo, you showed us some the other day when we were out inspecting the mill and seeing the land; it was a sort of a liquid, as I recall it, and I am wondering how you get it from Waimanalo to the mill in that form.

The Witness: We bring it from Maimanalo in bags.

The Court: Oh, it's dry at that time?

The Witness: Then it's dumped into that sugar bin that we didn't go back and look at the other side of the mill.

The Court: Would this be correct: does it come to you as a sort of brown raw sugar? [1219]

(Testimony of Stafford L. Austin.)

The Witness: It comes to us as raw sugar, but with a low polarization. Then we have to put it through the process again, through the centrifugals, to bring the polarization up so that when we put it through the filters, so we have a more pure sugar than we had originally from Waimanalo.

The Court: All right.

The Witness: We wash out some of the impurities.

The Court: That satisfies me. I was wondering how you get it in liquid form from one plantation to another.

The Witness: We take that raw sugar, then we put it in the mingler and we mix it with a little more molasses to bring it back into the same state as you saw that sugar that we put, that we had in the pans.

The Court: Thank you.

By Mr. Vitousek:

Q. Mr. Austin, previous to the takings involved in this suit, the Government took land used by the Honolulu Plantation Company, is that right?

A. Correct.

Q. Now, what I want to find out from you is, before the takings involved in this suit, other lands taken involved in this suit, what amount of raws could be made from cane on lands controlled by the Honolulu Plantation Company, sugar cane.

A. Between 20 and 21 thousand tons. [1220]

Q. Getting back to the refining end, is there any other refinery? You called the making of raws into whites refining, did you not?

(Testimony of Stafford L. Austin.)

A. Yes.

Q. Is there any other refining in the Territory?

A. There is one other refinery and that's at Maui Agricultural Company.

Q. Does that make any amount?

A. They make about 7,500 tons of sugar a year. That was their best year. I'm not quite sure of that figure but I think that was their best output.

Q. Now, Mr. Austin, you testified that the only raws available were from the Waimanalo Plantation in the island, is that right? A. Correct.

Q. Is there any sugar cane available for purchase in the Territory for use in the mill?

A. Not on this island. There is no free sugar cane that can be bought on the open market.

Q. Well, would it be practical to buy it on the other islands and bring it here? A. No.

Q. For use in the Honolulu Plantation mill?

A. No.

Q. Now, Mr. Austin, coming back to the mill itself, [1221] after the takings of the lands involved in these suits only, that is, the area that is shown on Exhibit 1 in red, how much sugar, raw sugar, could be made by the use of this mill you described from cane produced on lands owned and controlled by the Honolulu Plantation Company?

A. About 15,000 tons.

The Court: Wait a minute. How does that differ from the previous question to which he answered 20 to 21 thousand?

Mr. Vitousek: That was before the takings. This is in this suit after the takings.

(Testimony of Stafford L. Austin.)

The Court: On these after the takings?

Mr. Vitousek: After the takings. If the Court please, we have given three figures, one originally before any takings, then after the takings involved and then after the takings involved.

The Court: Let me have this last question.

(The reporter read the last question.)

The Court: Raw?

The Witness: Raw.

Q. After the takings involved in these suits, the plantation was what would be termed a 15,000-ton plantation? A. Correct.

Q. And that refers to the amount of raws that can be made from cane grown by it?

A. That's right. [1222]

Q. But the mill still remained capable of producing, manufacturing more raws? Did that have any effect on the value of the mill?

Mr. Rathbun: Just a minute. Did you finish the question?

Mr. Vitousek: I'll withdraw that question, if the Court please, and put it this way:

Q. What, if any, effect did that have on the value of the mill?

A. Well, we could have—it reduced the mill value to one, to a mill the size of one that would take 15,000 tons of sugar. If you've got a 15,000-ton sugar mill that size, it would have been ample to take care of the crop.

Q. Now, how about the irrigation system, the fact that these lands were taken, have any effect

(Testimony of Stafford L. Austin.)

on the irrigation system, as I understood you had designed to put in after the 1936 renewals?

A. Of course, in the lower area where all this land was taken we had to shut down pump 1 and the capacity of the pumps over on the other side of the plantation where they supplied water for 4, 7, 6 and 5—I might as well put it 4, 5, 6 and 7—

The Court: Fields?

The Witness: Yes, fields 4, 5, 6 and 7.

A. (Continuing): Reduced the amount of water necessary for that area. A good deal of money was spent in making [1223] concrete ditches over on that side of the plantation to carry the water to these areas. The system depreciated in value, or pumping system.

Q. If you only had available the fields now available, would you have the same size irrigation system?

A. We would not. We set out this irrigation system to take care of a full amount of land available at the time the system was designed.

Q. You mentioned field numbers, Mr. Austin, in your testimony. I refer you to exhibit 1 shown throughout here commencing with 1, rather large numbers on the areas marked in pink or in green. Are those the field numbers when you referred to field numbers, is that what you have been referring to?

A. Those are the numbers of the fields.

Mr. Rathbun: May I have that question?

(The reporter read the last question.)

(Testimony of Stafford L. Austin.)

Mr. Rathbun: I don't know what that question means.

The Court: Off the record.

(Discussion off the record.)

By Mr. Vitousek:

Q. Mr. Austin, how long has the Honolulu Plantation Company been conducting a sugar cane plantation and processing of sugar—

The Court: The question isn't— [1224]

Mr. Rathbun: If your Honor please—

The Court: —the question isn't finished and the witness starts to answer. Let's have the question.

Mr. Rathbun: Well, he apparently had the same misunderstanding I did.

The Court: Maybe.

Mr. Vitousek: If the Court please, I'll withdraw it and put the question so it will be clear.

The Court: All right.

Q. For how long has the Honolulu Plantation Company conducted a sugar cane plantation and conducted the manufacturing of sugar at Aiea?

Mr. Rathbun: Just a moment. Let there be an understanding on this, your Honor, without causing us to make repeated objections. May it be understood that we may reserve our exception to all this line of testimony with a motion to strike at the end, giving our reasons?

The Court: Beginning at this point?

Mr. Rathbun: All evidence. We have the objection twice on the same subject. Now, this is

(Testimony of Stafford L. Austin.)

getting to other subjects now. I don't want to repeat it all the time if it's not necessary. May it be understood that a motion to strike may be reserved at the end without making repeated objections all the way through?

The Court: Yes. [1225]

Mr. Rathbun: Your Honor understands that point? It's directly on the severance claim, of course, and there's nothing here yet.

The Court: I understand, and your position is preserved.

Mr. Rathbun: We'll make a detailed objection at the end on a motion to strike.

The Court: All right.

Mr. Vitousek: If the Court please, we are going to have several witnesses on that subject. In view of counsel's statement here, we'll be satisfied if he reserved that right to all of these witnesses.

Mr. Rathbun: Well, let's handle one at a time first.

Mr. Vitousek: All right, it's up to you.

The Court: Do you have the question in mind?

The Witness: I have.

The Court: Answer it.

A. The plantation was incorporated in 1899 and they started producing some sugar in 1900 and have been in operation since that time.

Q. That's a California corporation?

A. It's in California.

Q. Prior to the takings involved in these proceedings, would you state in general terms whether or not the plantation has been successful?

(Testimony of Stafford L. Austin.)

Mr. Rathbun: I object to that as calling for a conclusion [1226] and a multitude of things.

The Court: Successful is a broad term. I suppose you mean financially.

Mr. Vitousek: If the Court please, I'll withdraw that question and make it more specific.

The Court: All right.

Q. Prior to the takings involved in these proceedings, Mr. Austin, could you state, would you state please whether or not the plantation has provided a return on the capital investment?

Mr. Rathbun: I object to that for the same reason. That's a controversial subject.

Mr. Vitousek: That, if the Court please,—

Mr. Rathbun: If we have an audit here, it will show something.

Mr. Vitousek: I might as well refer to cases which state that that has a bearing on value, not coming to the point of capitalizing profits, but the question of whether or not it has been successful from a financial standpoint and paid a fair return and has a bearing on value. That's the purpose of this question. It's not to capitalize profits at all.

Mr. Rathbun: That depends on so many things. One of the principal things would be their method of keeping books. Now, if you are going into that question and let a conclusion like [1227] that be gone into here, it might require an audit to see by what system they have been successful. There are all kinds of ways of keeping books, specially in this Territory.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: That's the privilege of the Government to do that.

Mr. Rathbun: We don't have to do it. I say you are asking for a conclusion.

Mr. Vitousek: No, I am not asking for a conclusion.

The Court: Without going into detail, the witness can answer in a general way whether or not the plantation has been a successful enterprise.

Mr. Vitousek: That's what we are asking.

The Court: And you may have an exception, as you already have, to this line.

Mr. Rathbun: Beg pardon?

The Court: I say you may have an exception, as you have already, to this line.

A. It is my belief that the stockholders of the Honolulu Plantation Company have earned a fair return on their investment.

Mr. Rathbun: Now, I move that the answer be stricken on the same grounds, if your Honor please.

The Court: Same ruling, same exception.

Mr. Rathbun: The question wasn't responsive also.

Mr. Vitousek: I think it was responsive, if the Court [1228] please.

The Court: Proceed.

By Mr. Vitousek:

Q. Can you state, Mr. Austin, whether or not in peace times, normal times, it would be possible to successfully operate a plantation where it is a 15,000-ton plantation at Aiea?

A. At the location and with the lands left avail-

(Testimony of Stafford L. Austin.)

able, it would be—and the very heavy equipment that they have there for a larger output, it wouldn't be successful, and sooner or later the plantation would have had to be sold.

Q. Did the conditions prevailing during the war make a change in the operation of the plantation?

A. The heavy demand for refined sugar and the amount of raws that was necessary to put through the mill, through the refinery, to keep abreast of those demands, was enough to make the operation a successful one.

Q. Did those conditions cease on the termination of the war? A. They have.

Mr. Vitousek: Does the Court desire a recess?

The Court: Yes, we might just as well maintain our schedule. We will take a short recess.

(A short recess was taken at 10:03 a.m.)

After Recess

The Court: On the record.

By Mr. Vitousek:

Q. Mr. Austin, in the year 1944 or any period shortly prior to that time, within two or three years, do you know of any plantations the size of the Honolulu Plantation Company being sold in the Territory? A. No, I don't.

The Court: Louder.

A. I don't.

Q. Can you state whether or not there was a market for a sugar plantation such as that of the Honolulu Plantation Company during that year, 1944, or shortly prior?

(Testimony of Stafford L. Austin.)

A. My opinion is that there was no market for the sale of a plantation such as that.

Q. Now, Mr. Austin, what was the fair value as of June 21, 1944, but before any of the areas were taken that are involved only in this suit of all of the property of the Honolulu Plantation Company that formed a sugar plantation enterprise conducted by it on the Island of Oahu at Aiea near Pearl Harbor, excluding all movable personal property and excluding growing crops. A. I'd say—

Mr. Rathbun: Just a minute, please. May I have just a moment to make some notes? [1230]

The Court: Yes, and will the reporter read the question.

(The reporter read the last question.)

Mr. Rathbun: We object to that, in addition to the objection already made, if your Honor please, on the ground that Mr. Austin has shown no qualifications to answer such an enlarged question of value; the second reason is that the date that they are using, June 21, 1944, is the date of one case. They were taken at different times.

The Court: Let me get that again.

Mr. Rathbun: In these takings, they were at different times, not on one date. The ones involved in this case.

The Court: Well, this question relates to before the takings.

Mr. Rathbun: That's the trouble. He named the date, June 21, 1944. In other words, if there is anything to their theory, it took place after each take, and they vary. Not only that but there were

(Testimony of Stafford L. Austin.)

rights of entry way previous to that; one case, for instance, 527, possession was taken in March of '42 by the military governor's order, which your Honor can take judicial notice of.

The Court: Not if it's by a military governor.

Mr. Rathbun: Why not? The use of possession for the purpose of these cases.

The Court: Well, that's something we'll cross later.

Mr. Rathbun: Well, I'm making it now. [1231]

The Court: Well, I want to see it. You mean the military governor gave a right of entry to the United States?

Mr. Rathbun: They refused to give possession.

The Court: What was the matter with the Government coming to the Court? The Court was open.

Mr. Rathbun: They took this way of doing it. That's all. The right of possession of another branch of the Government.

The Court: At the moment it doesn't, for technical reasons, appeal to me.

Mr. Rathbun: Very well. The question covers such a field of possibilities and facts and assumed facts, etc., that without going into details and knowing what he based it on, that it's objectionable for that reason. That's all.

Mr. Vitousek: Well, if the Court please, this question is the question in the first place on the points made, that is, prior to the filing of the first suit and prior to the takings, which is, we take it, that it assumes the takings were made at the time

(Testimony of Stafford L. Austin.)

of the suit. There is no evidence in this record so far that the lands were taken prior to that time. I assume the Government in this case will put evidence in, and at that time we will cross that bridge, as to the legal effect of it or not, that the suits were filed, the first one was filed June 21, 1944, the first one involved in these suits, combination of suits. And they were filed [1232] thereafter over a period of approximately six months.

Now, the order of consolidation says that they be tried as if they were one taking, and we are taking the first suit. Now, if it should be different, we will put on evidence as to there being any difference over this 6-months' period. But we are entitled to ask this question on our theory of the case. That's one point.

The record shows in this case that settlement has been made and a judgment entered for growing crops, a damage to growing crops taken on these fields. So we have to exclude that.

The Court: In all 13 cases?

Mr. Vitousek: No, not in all 13, but in those where damage was involved. We are not claiming damage in all of them for growing crops. The actual growing crop damage was settled; an order, judgment, was entered, and payment made. So we are excluding that. Then, under the theory of cases that we have previously cited as to this case, Baetjer and one other, in fact, all the cases along these line of damage, severance damage, you must exclude personal property because that is not a subject of

(Testimony of Stafford L. Austin.)

damage in condemnation cases. So we are excluding the movable personal property and confining it to this question as it is framed, as confined to the property described, used by the plantation, either land or the buildings and heavy equipment such as the witness has [1223] described to the Court as forming the mill, the camps, the pumps, the irrigation system, and so on.

The Court: Do you include in this question the fee parcels?

Mr. Vitousek: The answer will include everything for which we claim damages in this action. As I explained at the beginning of the case, there are two theories, one relating simply to specific damages, in the event there is no severance damage allowed; if there is any question of value before and after the taking, it must include everything.

The Court: What I am getting at is that in terms of the objection that this witness is not qualified to express an opinion as to value, we have had one person testify for the owner as to the value of the fee.

Mr. Vitousek: Yes.

The Court: And we can't have a series of people coming here for the owner and giving their opinion.

Mr. Vitousek: If the Court please, this witness, as we have shown in the beginning, has the power of attorney from the owner. This is not on the phase that the other witness testified in regard to or which was on the question of specific damage.

(Testimony of Stafford L. Austin.)

This is on the phase of the value before and after the taking of all these properties. It is an entirely different question from the one that was presented to the first witness that your Honor refers to, which related only to four [1234] kuleanas.

The Court: Well, the only theory on which he could on this particular point express an opinion would be for and on behalf of the owner, not as an expert.

Mr. Vitousek: We haven't qualified Mr. Austin as an expert. We have made no attempt to.

The Court: Do you have anything to say as a reply?

Mr. Rathbun: No, your Honor.

The Court: I am going to overrule the objection, and you may have an exception. Now, will you read the question?

(The reporter read the last question.)

A. I would say about four million three hundred thousand.

Mr. Rathbun: Just a moment. All right.

The Court: You may answer now.

A. About four million three hundred thousand dollars.

Q. Mr. Austin, what was the fair value of all of the properties of the Honolulu Plantation Company that formed a sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops and after the takings involved in this consolidated action?

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Now, I object to that upon the same grounds, and further possible grounds, if your Honor please, that it doesn't appear that he is giving his opinion based upon the conditions and terms of the leases covering these properties, [1235] which are in evidence.

Mr. Vitousek: If the Court please, that last question, as the Court will recall this morning Mr. Austin said he knew about the leases, the extension and their terms.

The Court: I am going to overrule the objection. You may have an exception. Do you have the question in mind? It's the same question, only after these takings.

A. About three million three hundred thousand.

Q. Mr. Austin, in that question I asked you to exclude the movable personal property. You did not consider such? A. No.

Q. What in general is the character of that property which you have excluded?

A. The automobiles, cane loaders, trucks, moving railroad equipment, and such things as that, such equipment as that.

Q. As rolling stock of the railroad?

A. Of the railroad.

Q. How about equipment in the buildings like hospital equipment?

A. That also can be personal.

Q. Live stock?

A. Live stock, office equipment.

Q. Office? A. Office equipment. [1236]

(Testimony of Stafford L. Austin.)

Q. Does that come, without giving the figure, to any considerable sum on the books of the company? A. I beg pardon?

Q. Did that amount to any considerable sum, without giving the figure? A. That does.

The Court: Just a minute, meaning the office equipment alone?

Mr. Rathbun: I object to that.

Mr. Vitousek: The whole included.

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial and it calls for a conclusion.

The Court: Well, if we are not considering it, why particularly bother with it?

Mr. Vitousek: Well, if the Court please, this is a particular inclusion and it may become important later in relation to sales. We are not giving the exact figure, but it can be arrived at later, so it will be necessary.

The Court: Well, I can't at the moment see the particular materiality of it but I will allow the answer. You may have an exception.

A. Quite a sum.

Mr. Rathbun: I move that that be stricken as meaning nothing.

The Court: It may go out. [1237]

Mr. Vitousek: May I have the question?

(The reporter read the last question.)

The Court: The answer was "quite a sum."

Mr. Vitousek: I think that was in response to the question.

(Testimony of Stafford L. Austin.)

The Court: It does remain in, but the phrase "quite a sum" may go out.

Mr. Vitousek: Yes.

Q. One other question in connection with that, Mr. Austin. You gave a somewhat detailed list of the personal property excluded. That included current assets such as cash? A. It does.

Q. That is in the exclusion made in my question to you, and you giving the value excluded cash and current assets? A. Correct.

Q. Now, in regard to growing crops, Mr. Austin, growing crops on the fields during the dates for which you gave your total value, you excluded growing crops? A. Excluded growing crops.

Q. I ask you the same question in regard to growing crops, that the value of those crops would be large or small? A. Large.

Q. And those were excluded in your consideration? A. Excluded. [1238]

Mr. Driver: They have already been paid for them.

Mr. Rathbun: No materiality to that. I move that that be stricken.

The Court: Well, I couldn't see much materiality in the other one and I left it in, so I will leave this one in, too, for what it's worth. If it is not connected up some time later, you may move to strike it.

Mr. Vitousek: If the Court please, those are all the questions of Mr. Austin on direct.

The Court: You may cross-examine.

(Testimony of Stafford L. Austin.)

Cross-Examination

By Mr. Rathbun:

Q. Mr. Austin, you stated in your direct examination the other day that before the takes Honolulu Plantation had 4,300 acres with cane land, cane actually planted, is that right?

A. Available cane land.

Q. Available cane land. You mean planted with cane?

A. Well, some of the area wasn't all planted with cane. It might have been fallow at the time.

Q. Well, was all of the cane land upon which you could have planted cane being used for the growing of cane? A. It was.

Q. And on June 21, 1944? A. It was.

Q. Then 4,300 acres of land which you testified to didn't included in it only growing cane land?

A. I don't know what you are talking about on that one.

Q. What don't you know?

A. You said "only."

Q. Forty-three hundred that you testified to, was that all growing cane land?

A. That was the land on which you could grow cane.

Q. Well, how much was actually growing cane on it, that you were actually growing cane on?

A. The 4,300 acres.

Q. Well, that's what I asked you. All of it?

A. Well, no, some of it was in fallow. You

(Testimony of Stafford L. Austin.)

mean, you want to ask me how much cane was on the ground, in the ground?

Q. I want to ask you what you were using to grow cane on. A. The 4,300 acres.

Q. Actually grew cane on that 4,300 acres immediately preceding June 21, 1944?

A. Excepting where there was a field in fallow.

Q. What do you mean by "fallow?"

A. Well, it might have been in the process of being planted.

Q. Well, of course.

A. That's what I mean. [1240]

Q. I'm talking about cane, if you are going to exclude any that had never been used for cane. Was there any such included in that?

A. No, no.

Mr. Rathbun: If your Honor please, I think I should make a motion at this time to strike all of his testimony before we start any examination.

The Court: All right.

Mr. Rathbun: In addition to the reasons already given, and to be more specific at this time, we object to his testimony and I move to strike it on all, insofar as it applies to anything other than the land taken in the 13 cases involved in this trial, for the reason that the testimony is irrelevant and immaterial, attempts to lay the background for a claim which so far is unascertainable under the pleadings in the case; that it is improper to admit such testimony on the theory that it tends to establish or lay the foundation for a claim for alleged

(Testimony of Stafford L. Austin.)

severance damages without limiting the testimony to the leases offered in evidence, and without consideration of the legal effect of such leases upon the offer of the testimony of Mr. Austin. It is improper to permit a detailed description of all of the property of the defendant when only a small portion is involved in the 13 cases consolidated for trial, particularly so when such testimony is received without regard to the legal situation created by the [1241] leases and the effect of the condemnation proceedings on such leases. Further, it is improper to receive such testimony because in the leases containing condemnation clauses, the sum of which contained condemnation clauses, it is the Government's contention that upon the institution of said condemnation proceedings these leases were at an end, and hence the testimony is not material but on the contrary tends to confuse the issues. Further than that, specifically on the particular leases covering the Damon land, among these 13 cases, really raises a question of law that those leases have expired and never have been renewed and only had a very short time to run, a few months on their face.

Mr. Vitousek: If the Court please, this calls for quite an extended argument. If the Government is going to press it, it should give all the reasons. Otherwise, we have argued some of this and others we haven't.

The Court: This would go to the whole case. I'd like to have it full argued by both of you at

(Testimony of Stafford L. Austin.)

the end because it gets right to the merits of the entire matter before the Court. So at this time, with the right to renew it and argue it later, but for the purposes of giving you protection at the moment, I will deny your motion to strike and give you an exception with the understanding that I want this whole matter argued fully when all the evidence is in.

By Mr. Rathbun:

Q. Now, you said, Mr. Austin, among other things that [1242] the general practice in this Territory in connection with sugar plantations was to lease land. You meant by that lease it rather than buy it in fee? A. Was to lease land, yes.

Q. Rather than to buy it?

A. They couldn't buy it; most of the land was in lease, had to be leased in order to operate it.

Q. That's why I asked you the question. That wasn't because of any practice in the sugar plantation business, but was rather because of the close holdings of the lands by big estates that would not sell them in fee. Isn't that the answer?

A. Well, that was the reason why they were leased.

Q. Yes. That's what I mean.

A. If you wanted a sugar plantation you'd have to go out and lease the land.

Q. You used the words "it's the practice." There isn't anything peculiar about any practice except that you couldn't buy any fee land.

A. It's the practice on this island because practically every one of the plantations is leasehold.

(Testimony of Stafford L. Austin.)

Q. Well, they do so because they have to; they can't buy it in fee?

A. I imagine that's the reason.

Q. Well, you know that's the reason, don't you?

A. I imagine, sure, I think so. I don't believe you can go out and buy the land.

Q. Now, you said that this mill could manufacture originally 13,000 to 35,000 tons of raw sugar, is that correct?

The Court: Thirty to thirty-five.

Mr. Rathbun: Thirty to thirty-five.

A. Thirty to thirty-five.

Mr. Vitousek: You said thirteen.

Mr. Rathbun: I'm sorry.

Q. Now, what time did you have in mind when you fixed those figures? A. What time?

Q. Yes.

A. That was before the, before any of the takings.

Q. Back how far in years?

A. Well, in 1932 or 3, we put through 34,000 tons, somewheres around there. I couldn't tell you exactly now.

Q. Well, is that when it was, 1932 or '33?

A. It was—no, 1928 we put through 34,653 tons of sugar.

Q. All right, then, it was in 1928, is that right?

A. Yes.

Q. Is that the first time that you had reached that capacity?

A. That's the first time we reached that capacity.

(Testimony of Stafford L. Austin.)

Q. And that capacity continued up to when?

A. We had in 19—that's for one year we put through 34,653 tons.

Q. All right. Then what is the next tonnage, the next year, if you've got it by years?

A. Yes, 1929 was 31,912.

Q. What was it in '30? A. 31,475.

Q. What was it in '31? A. 29,691.

Q. Thirty-two? A. 31,046.

Q. Thirty-three? A. 30,008.

Q. Thirty-four? A. It was 23,168.

Q. Thirty-five? A. 26,357.

The Court: Once again? Just a minute.

A. 26,357; 27,296.

Mr. Vitousek: Twenty-seven or thirty-seven?

The Witness: 1936 was 27,640—296.

Q. What was it in '37? A. 27,296.

Q. What was it in '38? A. 27,640. [1245]

Q. And '39? A. 26,238.

Q. '40? A. 24,712.

Q. '41? A. 24,226.

Q. '42? A. 16,191.

Q. '43? A. 20,525.

Q. What was that? A. 20,525.

Q. Twenty? A. 20,525, tons.

Q. And the next year?

A. I haven't got that here.

Q. You only go to the year what?

A. 1943.

Q. Does that include the year 1943, the last figure you gave?

(Testimony of Stafford L. Austin.)

A. Yes, that was the last figure I gave, 20,557, I think.

Q. Were those figures that you have now given working the mill to capacity through those years?

A. When we get up to 34,500 tons we were getting the peak. [1246]

Q. But under that you didn't hit your capacity, is that it, in other years I mean?

A. Well, we did for the season.

Q. What do you mean "for the season?"

A. Well, I mean the season runs for ten months and we had 24-hour service, 24 hours around the clock, 6 days a week, running as rapidly as we could. Now, we had a leeway of another month, and if we put a little more pressure on it, why we could get up to 35,000 tons. In other words, that was the peak, between 30 and 35 thousand tons was the peak load for the mill.

Q. But you didn't get it in those years that you have given? A. No, not the peak.

Q. Now, there were some previous lands taken, weren't there, before the cases involved here, the 13 cases, by the United States Government?

A. Yes, correct.

Q. Cane land? A. Cane land, yes.

Q. When was Hickam Field taken?

A. Hickam Field is 1935, I think it was, yes.

Q. And how many acres were involved at that time?

A. About 600, somewheres around there, 600. I'll look it up for you if you like. I don't know whether that's the exact figure. [1247]

(Testimony of Stafford L. Austin.)

Q. Well, that's approximately 600, 600 odd, according to my understanding. You have given a value of \$3,300,000 after the takings in these 13 cases. Is that what you meant?

A. That's what I meant, yes.

Q. What's the value of that property, of the property of the Honolulu Plantation Company, with the exclusion that you gave here, immediately previous to the Hickam Field taking?

A. About a little over \$5,000,000.

Q. So that according to your theory the 600 acres brought the value down—strike that. What was it after the taking?

Mr. Vitousek: What taking are you referring to?

Mr. Rathbun: Hickam Field.

Mr. Vitousek: There were two Hickam Field takings.

Mr. Rathbun: He knows the one, 600 acres.

A. Between that and—I would say it was about five million.

Q. Five million, still worth five million after they took the 600 acres?

A. No, I said it was worth over that when they took Hickam Field. It was worth between five and six million.

Q. Oh, you want to change that now?

A. That's O.K. with me.

Q. Well, you are testifying.

A. About five million five hundred. [1248]

Q. About five million five hundred now? Is

(Testimony of Stafford L. Austin.)

that your final figure, immediately preceding the taking of Hickam Field? A. I would say that.

Q. Then it was worth five million after they took the 600 acres of Hickam Field?

A. Yes, close to that.

Q. So that 600 acres were all in production of cane, were they?

A. They were all in production of cane.

Q. Went through this same mill that you have testified about? A. Same mill.

Q. And the 600 acres brought it down \$500,000, is that it?

A. Oh, I'd say somewheres around there, between five and six hundred thousand dollars.

Q. Now, after that Hickam Field take, up to the time of the taking in these 13 cases, after the Hickam Field take and up to the time of the first of the takings in these 13 cases, how many acres of cane were taken by the Government that were being used for the growing of sugar?

A. Oh, between eight hundred and a thousand.

Q. What's that?

A. Not quite sure on that but I think it's between eight hundred and a thousand. [1249]

Q. Then when they took the first take of those—what cases were those, do you know? What cases were those involved in, do you know?

A. I haven't got the numbers of those cases.

Q. Is Makalapa crater on it?

A. Yes, Makalapa crater.

Q. It was Civil 416, wasn't it?

(Testimony of Stafford L. Austin.)

A. That I don't know. I haven't got the numbers.

The Court: Mr. Rathbun, do you want him to look at the same type of map you are looking at?

Mr. Rathbun: Yes, your Honor.

The Court: Exhibit 8. The numbers of the cases are marked on that map. (Handing map in evidence to the witness)

By Mr. Rathbun:

Q. Do you see a number on there, 416, Mr. Austin, right at the beginning of the Aiea waterfront?

A. Yes, 416, I see that.

Q. That's one of the takes that took place after Hickam Field? A. That's right.

Q. How many acres are involved in 416?

A. I wouldn't know until I look it up. I'll have to look it up.

Q. Could you estimate it?

A. I think it was some 80 odd acres. [1250]

Q. Can't you take your cane map, and the fields, and tell? A. I can't tell by looking at it.

Q. Why not?

A. It doesn't give the area up there.

Q. It goes to Makalapa?

A. Makalapa crater. I would say on an offhand basis, I would say about 87 acres in that area. I'm not sure.

Q. All right, that's close enough.

A. I'll have to look up the records.

Q. Now, what other cases, using that map, the one that you have in your hands?

A. Well, it includes—

(Testimony of Stafford L. Austin.)

Q. What other cases did they take of land after the Hickam Field takes? A. —field 81, 97, 98.

Q. Now, if you are going to talk about fields—

A. I talk about fields better than I do—

Q. I know, but I can talk about others better. But that doesn't help me any.

The Court: Suppose you put both of your knowledge together.

Q. Point out where the next is that you had in mind? A. That's the—

Q. That's the case we have been talking about, the Makalapa crater, is it not? [1251]

The Court: Civil 416.

Mr. Vitousek: I don't get the question.

Mr. Rathbun: The question has gone by long ago.

Mr. Vitousek: Well, I think the two ought to be tied up.

The Court: Just a minute. The witness has said that after the Hickam takes and before these takings there were in his opinion about eight hundred to a thousand acres taken by the Government. Now, Mr. Rathbun is trying to break that down into cases, and he mentioned first that there was involved as part of that eight hundred to a thousand acres Civil 416, Makalapa crater, roughly 87 acres. Right?

The Witness: Yes, the crater is 87, but there's some more down here.

Q. Yes. That's 416, now isn't it? Have you got fields on this map, Exhibit 1? You've got fields 72, 80 and 81 shown? A. Yes.

(Testimony of Stafford L. Austin.)

Q. Now, there were some more taken in that case towards the harbor, wasn't there?

Mr. Vitousek: I object to these questions. It seems as if Mr. Rathbun is testifying. Mr. Austin says he can't tell the exact areas involved unless he looks it up. And now the attorney is pointing out, saying some of these were taken, now, weren't there more taken towards the harbor. I think there ought to be a question and answer.

Mr. Rathbun: Well, I tried to make a question. If you [1252] are objecting to my leading, I have a right to leading on cross-examination.

Mr. Vitousek: I don't object to your leading. I object to your testifying. Now, you said in these there were some takings and wasn't there more towards the harbor. What I am objecting to is that statement.

Mr. Rathbun: I have a right on cross.

The Court: You have a right to ask questions and not to make a statement and then add to that.

Mr. Rathbun: I submit I made a statement to that.

The Court: All right. May we have the last question?

(The reporter read the last question.)

By Mr. Rathbun:

Q. In addition to fields 72, 80 and 81 shown on Exhibit 1 in this case, weren't there more lands taken in 416, Civil 416 in this Court, those lands being in the direction towards the harbor?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: Now, if the Court please,—

Mr. Rathbun: Immediately adjoining these fields.

Mr. Vitousek: —what I object to is the statement by counsel. There is nothing on Exhibit 1 showing that those fields were in 416.

Mr. Rathbun: That's why I'm asking.

Mr. Vitousek: Well, ask it. I object to counsel saying they were in 416 and then proceeding to ask a question on that [1253] assumption until it has been shown or some question asked. It's misleading. It's an improper question because it contains a statement that these fields were in that which I don't know, and the map does not show it.

Mr. Rathbun: Your client has said so, or your witness has, rather.

Mr. Vitousek: I haven't heard him saying so. He had been talking about Makalapa crater. Why don't you ask him?

Mr. Rathbun: Well, I did ask him.

The Court: Just a minute. I don't think the question is out of order as last stated. Let me ask whether or not another map would be more useful?

The Witness: Well, if I knew. I can't tie up the fields with this map. I know 72, 80 and 81 were in that case. Now, whether there was a little bit more on the right or left, I'm not sure. I think there was. I think there was. That was not in cane land. It was some other.

The Court: Was not?

The Witness: Was not.

(Testimony of Stafford L. Austin.)

Q. Now, what other cases were there in addition to 416 after the Hickam Field takes in which lands of the Honolulu Plantation Company were taken?

A. Well, there was the field at the hospital, field 77 was taken here.

Q. Field 77? [1254] A. About 67 acres.

Q. That was be suit No. 535? A. 535.

Q. Yes? There's a series of takes, 452—

Mr. Vitousek: I think that ought to be shown in the record, that the number should be 452.

Mr. Rathbun: Now, let that show in the record. For God's sake.

Mr. Vitousek: Now, this was introduced in evidence and it was shown in evidence and it was shown it was not accurate, and it was simply produced to show the general locality. And I think that the Court will recall when that was put in evidence that No. 1 does not show the exact areas, the exact location.

The Court: Well, there is nothing before me to rule on. I think it might be advisable for us to take a recess at this time and see if we can start afresh without all this unnecessary argument.

Mr. Rathbun: May I have a ruling of the Court warning the witness not to talk to anyone during intermission, to counsel or anybody else?

Mr. Vitousek: What is the ruling?

The Court: There is none. He is asking for a ruling that during the recess the witness not be allowed to talk to anyone. It's a little bit unusual.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Many, many times it's been done in court.

Mr. Vitousek: It's my practice not to talk to a witness—whenever he is not on cross-examination, but afterwards we have the privilege.

The Court: The witness is on cross-examination. I don't think there is any ruling necessary.

Mr. Rathbun: Exception.

(A short recess was taken at 11:07 a.m.)

After Recess

By Mr. Rathbun:

Q. Now, Mr. Austin, let's start all over again. In addition to Makalapa crater, other lands were taken by the Government being used to raise sugar cane for Honolulu Plantation, were there not?

A. There were.

Q. What is the next take that you know about?

A. After the Hickam Field taking?

Q. After the Makalapa.

A. Oh, Makalapa.

Q. Can you give the numbers of acres, about?

A. Oh, I can't be sure.

Q. Well, can you estimate it?

A. Yes, it was, I imagine about 150, 160 acres.

Q. All right. What is the next take that you know about? [1256]

A. Next take was—maybe, I may be wrong in the sequence. It's been such a long time ago, but I think the next take was up there in Red Hill.

Q. Yes, Civil 452 that would be. How many

(Testimony of Stafford L. Austin.)

acres were in that taken and when was it about?

A. 1940, I think.

Q. How many acres in that take? About?

A. Oh, there was over a hundred acres.

The Court: Just a minute. When he said, or somebody said, Civil 452, someone else said Red Hill.

The Witness: Red Hill, yes.

The Court: 452 is where the Naval hospital is located, isn't it?

Mr. Rathbun: Up here. (Indicating on map)

The Clerk: 522 is the Naval hospital.

Mr. Rathbun: 452, here. (Indicating on map)

The Witness: Red Hill we are talking about.

Mr. Rathbun: You are talking about this — right?

The Court: This isn't Red Hill, is it?

The Witness: No, that's the Navy hospital.

Mr. Rathbun: That's the Navy hospital.

The Witness: I'm talking about Red Hill.

Q. 442? A. 442.

Q. Correct the 452 to 442. Now, in 442, how many acres [1257] were involved?

A. There was over a hundred acres involved in that. I don't know exactly how much. I can give you the record on all of this if you'd like it. I mean I have to get it. I haven't got it with me.

Q. I can't help that. I'm asking you what you know about it. That's all I can do. Now, what other takes were there in addition to that, previous to the 13 cases we are trying here and after Hickam Field?

(Testimony of Stafford L. Austin.)

A. There was the Navy hospital, which is 442, I think, on your map. That was about 67 acres in that field.

The Court: That's 452 at long last.

Mr. Rathbun: That's right.

A. Then we had—

Q. Wait a minute. What year was that in 452?

A. That was either '40 or '41. I'm not sure which.

Q. What other takes were there within those periods of time?

The Court: Excuse me. You didn't ask the acreage on that.

Mr. Rathbun: Sixty-seven acres.

The Court: Sixty-seven acres?

Mr. Rathbun: Is that right, Mr. Austin?

The Witness: About sixty-seven.

The Court: Now, after that, the next take was what?

The Witness: Down in Puuloa, Field 97. [1258]

Mr. Vitousek: I didn't get that field number.

A. Field 97. That's a gore lot.

Mr. Rathbun: Civil 436, I think.

The Court: Civil 436.

Q. And when was that take, Mr. Austin?

A. That was taken in 1941-2, I think, beginning of '41, I think that's when it was taken.

Q. And how many acres were in that?

A. Well, there was 97 acres. You add them up and I'll try to give them.

Q. Well, about? You are familiar with these fields, aren't you?

(Testimony of Stafford L. Austin.)

A. Sure, but I have been away from there for two and one-half years, longer than that, three years.

Q. Give an estimate of it.

A. About 253 acres in that, approximately 250 acres.

Mr. Driver: Instead of 97?

The Witness: That's 97, 96.

The Court: Field 97?

The Witness: 97, 96, 95 and a portion of 94.

Q. All right. Any others in that period of time?

A. Then there was a portion of 94, 93 and 92.

Q. Fields you are referring to?

A. Yes, fields. And that was a later date.

Q. Well, just previous to the takes in this case now I [1259] am talking about.

A. Yes. Right here. (Indicating on map in evidence)

The Court: Louder.

A. Here, this portion.

(Discussion off the record)

By Mr. Rathbun:

Q. Now, you just got through giving the gore lot as being 253 acres. A. Well, plus—

Q. Wait a minute. I'll straighten it out. Upon looking at the map which the Judge has there, which you have been referring to, showing these cases and their general location—

The Court: Exhibit 8.

Q. —Exhibit 8, do you want to change your testimony as to what was involved in Civil 436

(Testimony of Stafford L. Austin.)

now? A. Yes, because I missed—

Q. All right, give us the total, then, again.

A. You want the total in 436?

Q. That's right.

A. Three hundred fifty-two would be more like it.

Q. All right. Now, are there any other takes in between those dates?

A. There was a piece below the main highway where they had used for recreational grounds; that was about 23 acres of cane land, a portion of field 62 below the Kam highway. [1260]

Q. Shown on Exhibit 8, that would be Civil 430.

A. About 23 acres, somewheres around there. That was in cane land.

Q. What year was that?

A. That was taken in 1940 or '41, before the blitz.

Q. Any other between those dates?

A. I can't—I think that's—maybe one or two small pieces I haven't mentioned but I think that's the largest portion.

Q. And that's in round figures about 700 acres in the ones you have testified to which took place between the taking in the Hickam Field and the cases on trial here? A. That's right.

The Court: Just a minute. Will you and Mr. Vitousek come up here a moment?

(Discussion off the record)

The Court: Now, Mr. Reporter, the total?

(Testimony of Stafford L. Austin.)

(The reporter read the total mentioned in last question.)

The Witness: I was going to say that you, if you want the accurate figures on these, why we can produce them for you. I won't say that there are.

Mr. Rathbun: Well, you speak to Mr. Vitousek about that, then. I'm satisfied with what you have given.

Mr. Vitousek: Did he say he wouldn't vouch for these figures? [1261]

Mr. Rathbun: He didn't say such thing.

The Court: He offered to make accurate figures available. I should think they would be available in the Court files. Proceed.

Q. Now, at the date of the first of these last takings that you have talked about, Makalapa was the first, wasn't it? A. Makalapa, yes.

Q. Now, when they took Makalapa crater, you'd you'd say that the valuation on all of these things, with the exclusions that you have made, would be about five million dollars, is that your testimony?

A. That was my testimony.

Q. Now, how much did the first take on Makalapa crater reduce that value, the 150 to 160 acres?

A. Oh, I would say in the neighborhood of \$160,000, somewheres around there.

Q. And what did the Red Hill take of a hundred acres decrease it? A. About \$100,000.

Q. And the Navy hospital, 67 acres?

A. About sixty-seven thousand.

Q. What?

(Testimony of Stafford L. Austin.)

A. About sixty-seven thousand.

Q. And the gore lot, 352 acres?

A. About \$352,000. [1262]

Q. And the 23 acres?

A. Twenty-three, about \$23,000.

Q. You are using a thousand dollars an acre on each one of those, aren't you?

A. Correct.

Q. Why do you do that?

A. Well, it's been the, more or less the rule of thumb from the standpoint of the plantations in my experience in the plantations in talking with others, from the standpoint of the Honolulu Plantation Company, with the refinery and such, that a thousand dollars an acre was an equitable figure to use for that purpose.

Q. That's according to the books of the Honolulu Plantation Company and their method of book-keeping, is that what you mean? A. No.

Q. What do you mean, then?

A. I mean from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure.

Q. Well, is that valuation of the plant? Are you getting a capital value to it now in that answer? A. A capital value. [1263]

Q. Capital assets?

A. The initial investment, such as for ditches

(Testimony of Stafford L. Austin.)

and pipe lines and mill and all the equipment necessary to run a plantation.

Q. Did it reduce your capital investment when the Hickam Field take was made, according to your theory?

A. Did it reduce the capital investment?

Q. Yes, the value of it.

Mr. Vitousek: If the Court please, we object to that. There are two different questions there. First he says it reduced the capital investment and then the value of it. That is not the same question at all.

Mr. Rathbun: Same thing, in my opinion.

Mr. Vitousek: Well, if the Court please, no matter what counsel's opinion is, what you invest in an enterprise doesn't necessarily mean it is the value of any piece of property. Capital investment and value are two different things

Mr. Rathbun: I'll make it easier than that.

Q. Did anything happen to your capital investment after the Hickam Field take?

A. It shrunk the value.

Q. By how much?

A. It shrunk the value of the total investment of the value of your mill and the rest of the plantation as a whole.

Q. Well, you carry capital investment on the books, [1264] don't you?

A. Your capital investment is carried on the books, yes.

Q. Was there a change made in the capital in-

(Testimony of Stafford L. Austin.)

vestment after the Hickam Field take, on the Honolulu Plantation Company books?

A. Well, that I haven't testified.

Q. You haven't seen fit to look that up?

A. I haven't seen fit to look it up?

Q. Yes, I'm asking you.

A. Well, I'm not an expert accountant.

Q. Never mind why. Have you?

A. No, I haven't.

Q. You're still testifying here as an expert on value, aren't you? A. No, I am not.

Q. You are not? A. No, sir.

Q. In what capacity are you testifying?

A. I am testifying as a plantation operations man.

Q. Did you ever sell a plantation as big as this before? A. Never sold one.

Q. Never been one sold here as big as this?

A. Not that I know of.

Q. You have nothing to go on except your opinion? A. That's right, correct. [1265]

Q. Now, in your opinion, would the capital investment be depleted in any amount by the takes in the Hickam Field case?

A. Capital investment, it would shrink in value.

Q. By how much because of that take?

A. About \$600,000.

Q. You don't know whether the books show that or not?

A. No, I don't. I couldn't say. That's my opinion.

(Testimony of Stafford L. Austin.)

Q. Likewise, these five other takings after Hickam Field, amounting to in the neighborhood of 700 acres, did those reduce the capital investment?

A. It shrunk the value of the plantation by that much.

Q. Affected capital investment that way, did it?

A. It wouldn't affect the capital investment;—

Q. Yes?

A. —but it would shrink the value of the whole plant, as a whole.

Q. And you think it wouldn't have any effect on the capital investment?

A. Well, it would reduce the value of the plantation to the stockholders, to the owners.

Q. I heard you say that. Did it have any effect on the capital investment?

A. I couldn't tell you.

Q. Now carried on the books as capital investment? [1266]

A. I am not able to answer that one.

Q. You never saw the books in that respect of the Honolulu Plantation Company?

A. Why, I haven't, not in that one item.

Q. Then you haven't seen them, you haven't looked at them in that respect?

A. Not in that respect, no.

Q. Along the line of your testimony as to the value of the things that you testified to, with the exclusions thereon, did the amount of overhead in any way have any effect on your conclusions?

A. The amount of overhead?

(Testimony of Stafford L. Austin.)

Q. Yes. A. What do you mean?

Q. Well, did it have any effect on it in giving your value? Did you consider the overhead? Wouldn't that go into the question of the value of a plant like this?

A. It gets top-heavy if you've got too much overhead, and if it gets too small why you can't operate it efficiently if you don't have enough stuff coming in, and you have to operate a big plant to get——

Q. I know that's your point, but that isn't what I asked you. Overhead would have an effect on the value that you'd give to this property, wouldn't it, whether it was large or small? [1267]

A. It would have some effect, yes.

Q. Don't you think that a purchaser of this property would consider what the necessary operating overhead was when an offer was made for this property, if an offer was made?

A. If there was an offer made, he would.

Q. Your value, then, was that someone would make an offer, then, to the amount that you testified to? A. That's right.

Q. Was there any increase on the overhead of the books of the Honolulu Plantation Company from the year 1940 up to the date of the first taking in these 13 cases?

A. Any increase in overhead?

Q. Yes.

A. There was probably a slight increase but not because——

(Testimony of Stafford L. Austin.)

Q. How much did it increase in 1941 over 1940?

A. That I couldn't tell you.

Q. You never looked at the books to see?

A. I may have looked at the books but I didn't take that into consideration.

Q. You didn't take that into consideration at all in giving this valuation that you have given?

A. No, I didn't.

Q. Do you know what it was from 1941 to '42, increase or decrease, if any?

A. No, I don't. [1268]

Q. From '42 to '43? A. No.

Q. From '43 to '44? A. No, I don't.

Q. You don't know how it was carried on the books during those years?

A. No, I don't know exactly how it was carried on the books.

Q. But did you assist in the preparation of a claim that was filed before the Congress of the United States on behalf of the Honolulu Plantation Company? A. I did.

Q. Did you look at the exhibits that were attached to that claim?

A. I looked at them, yes.

Q. Did you have anything to do with the preparation of them? A. A portion of them, yes.

Q. One of those exhibits contained a layout of the percentage increase in overhead during the years that I asked you about, didn't it?

A. I imagine it did, yes.

Q. Well, do you know whether it did or not?

(Testimony of Stafford L. Austin.)

A. I will have to look up the brochure.

Mr. Rathbun: May I get that, your Honor?

The Court: Yes.

(Mr. Rathbun leaves courtroom for few minutes, returning with a paper-covered book.)

By Mr. Rathbun:

Q. If the overhead went up from a percentage of cost per ton from 6.25 in the year 1940 to a percentage—strike that. It should be 8.98. To a percentage of 18.13, that would quite considerably affect the value of what you have testified to here, wouldn't it?

A. The overhead going up that way?

Q. Yes. A. It probably would.

Q. Well, it would, wouldn't it? Any doubt in your mind about it?

A. A prospective buyer would probably take that into consideration.

Q. Yes.

The Court: Excuse me. You gave a year for your first figure but not a year for your 18.13.

Mr. Rathbun: Well, I assume up to the date which he testified, which was 1944, the takes in this case.

Q. Do you know what the tonnage of cane grown on all of the lands of the Plantation Company in the year '25 were, or first '24, 1924?

A. I don't know whether I have that here or not. [1270]

(Testimony of Stafford L. Austin.)

Q. Any idea what it was? Oh, pardon me. You said you have it there?

A. I think I have it here. Just a minute.

Mr. Vitousek: May I have the question read?

The Court: Yes.

(The reporter read the last question.)

A. Twenty-six, 26,554 tons. I haven't got '24. I imagine somewhere——

Q. What year did you give?

A. I gave '26.

Q. 1926?

The Court: And the figure, again, was?

The Witness: 26,654.

Q. You haven't got it in '24?

A. No, I haven't got it.

Q. You haven't got it in '25?

A. No, I haven't. Mine starts at '26.

Q. Well, if it was in 1925 approximately 22,000 tons and in 1924 approximately 20,000 tons; and in 1942, 16,329; and in 1943, 25,000, it would show that your cane production was about the same in 1941, in 1943, in 1942 and 1943, that it was in '24, '25 and '26, wouldn't it? A. That would be——

Q. Is that the fact?

A. Well, you said it's 20,000. [1271]

Q. I'm asking you to assume. I see you haven't got it there.

A. Yes, that the cane tonnage produced by the plantation would be about the same, if it was 20,525.

Q. Well, you participated in the preparation of

(Testimony of Stafford L. Austin.)

these exhibits in connection with this claim filed in Congress, didn't you? A. Yes.

Q. I show you the figures (Showing a document to the witness), shown on table 1 attached to the claim as filed with Congress, and this shows in 1924, 20,220, plantation grown cane, does it not?

A. It does.

Q. Is that correct? A. That's correct.

Q. In 1925 it shows 22,627 tons?

A. That's correct.

Q. Plantation grown cane. Then you get to 1926, the year that you testified about, and it shows 27,061? A. Right.

Q. In 1941 it shows 24,088 tons, does it not?

A. It does.

Q. In 1942 it shows 16,329?

A. That's right.

Q. And in 1943 it shows 20,525? [1272]

A. Correct.

Q. Now, that's the total cane grown in those years, wasn't it? A. That is.

Q. On all of the lands devoted to cane by the Honolulu Plantation Company?

A. Correct.

Mr. Vitousek: If the Court please, this is only a small matter but counsel is reading from what shows sugar production from cane, not cane. It makes quite a difference.

Mr. Rathbun: I'm going by the heading of what I'm reading from, plantation grown cane.

Mr. Vitousek: You look at the other column.

(Testimony of Stafford L. Austin.)

The Court: The witness is talking about tons.

The Witness: I meant sugar, tons of sugar, not cane.

Mr. Rathbun: Well, it doesn't matter one way or another as far as I am concerned.

The Court: That's raw sugar?

The Witness: No, that's refined sugar from the Honolulu Plantation Company.

The Court: And that's what you had in mind when on your direct examination you gave a similar figure for the year, when you gave similar figures for the years 1929 to 1943? You meant tons white sugar?

The Witness: Tons of refined. [1273]

The Court: All right.

By Mr. Rathbun:

Q. In 1943, after all of these takes that you have testified about, the company was able to refine the same amount of sugar as it did in 1924, isn't that correct? A. That's correct.

Q. Now, you designated certain parts of this property that you testified as to a value as personal property. Did you include in your value all of the crushing machinery and the boilers and mixers and filters, all that contained in the mill?

A. All the milling machinery in the mill.

Q. You treated that as real property, is that it?

A. That's right.

Q. All of it could be removed, taken out, and put into another plant some place, could it not?

A. It could be, yes.

(Testimony of Stafford L. Austin.)

Q. Just a matter of loosening from the floors on most of it, isn't it, from the cement that it is in?

A. Bolted down to cement foundation.

Q. Take the bolts out and the machine would leave physically complete, wouldn't it? Right?

A. Leave the machines, yes.

Q. That's true of practically all the machinery in there, is it not, in the mill? [1274]

A. With the exception of the boilers.

Q. With the exception of the boilers. Well, you'd have to remove the concrete surrounding it, but you'd still get the boilers out, couldn't you?

A. Yes, get the boilers out.

Q. Now, Mr. Austin, in this first take at Hickam Field, insofar as the cane fields that you had left were concerned, they were the same cane fields, the same quality, the same soil as before the take, were they not?

A. Which? You mean the Hickam Field takings were the same as before?

Q. The remaining fields after the take.

A. Oh, after the take, were the same as before the take.

Q. Yes? A. They were the same, yes.

Q. Grow the same kind of cane on them?

A. No.

Q. Use them for the same purpose?

A. But not the same kind of cane.

Q. Didn't change the character of the land any?

A. Not the character of the land.

Q. The lands were worth just as much as before?

(Testimony of Stafford L. Austin.)

A. That you'd have to get some real estateman—they would probably be a little more, depending on the time, and as things have gone along land values have increased. [1275]

Q. That's due to other reasons than the taking of Hickam Field, isn't it? It's due to conditions, labor and more money for sugar maybe or things like that. Did the fact of the taking itself change the character of those cane lands in any way?

A. No, it didn't.

Q. The remainder of the land. They had the same value they would have had if they hadn't taken the Hickam Field land, didn't they, physically? A. Physically they were the same.

Q. Yes. And that is true as to every one of these takes that you have testified about as to the remaining land, is it not, as far as land is concerned? A. Physically it was the same.

Q. Now, as far as the physical instrumentality in this mill is concerned, the taking in the Hickam Field case didn't change whatever those boilers and filters and grinders and everything, did it, physically? A. Physically they were the same.

Q. Didn't change them at all, did it?

A. From the standpoint of the company——

Q. I didn't ask you anything else, please.

A. Physically they didn't change.

Mr. Vitousek: If the Court please, I understand he did have something else. He said value in his first question. [1276]

Mr. Rathbun: And limit it to what I said.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: There's a difference between the answer and the value. Now, there's a difference between them being the same physically and having the same value, and he did have the word "value" in his question.

Mr. Rathbun: I have tried to confine him to physically.

The Witness: No, physically they are the same.

The Court: All right.

Q. Any change that took place because of these takings was a matter of book figures, wasn't it? In other words, put it this way: The only change that caused—the only thing that caused any change by virtue of this take or these takes, was that you had more land—I mean you had more equipment than you needed to work the remaining land, is that right? A. That's a correct statement.

Q. Now, your opinion is that by virtue of the take that had some effect upon the value of what was left? A. That's right.

Q. Now, just tell me how that took place in your mind? A. Well, if you——

Q. Because of what?

A. Well, the fact is this, if you have a great big piece of equipment and you built the whole plantation with the idea of operating in a certain manner, with a certain tonnage, when you don't get that tonnage by reason of a cutdown in the area, then the whole, your whole equipment decreases, there's [1277] a shrinkage in value of the

(Testimony of Stafford L. Austin.)

equipment because you can't do what you put it up to do.

Q. Now, the reason it shrinks on what you have stated is because it costs more to operate it, that's one of the things, isn't it? A. It does.

Q. Therefore, you make less profit?

A. You make less profit.

Q. That's why it decreases in value, isn't it?

A. That's right.

Q. That profit that would be changed by those takings is a variable thing, isn't it, from year to year?

A. Well, it depends on conditions.

Q. It depends on labor cost?

A. And area and what you have to operate with.

Q. The price you get for sugar?

A. That may be so.

Q. The cost of labor? A. Correct.

Q. And the basis of your statement, then, on value is that because of this loss of the ability to make profit as large as they could have with a larger acreage, this decrease or shrinkage of value has taken place, is that right?

A. No, that isn't what I said.

Q. It isn't what you said? [1278]

A. I said the value of the whole plant takes a shrinkage in value due to the fact that you are losing some of your productive areas.

Q. Just what makes the plant shrink, then? What is it, the process of what?

A. Of cutting down on the number of tons of cane, sugar going through the mill.

(Testimony of Stafford L. Austin.)

Q. You don't care anything about that or any other corporation, the number of tons going through the mill—it's profit they are interested in?

A. Correct.

Q. And that's the only basis on which anybody would buy it, with the prospect of making money out of it?

A. Absolutely, yes.

Q. And if they made less money because of less acreage, they'd pay less money for it, wouldn't they?

A. They would.

Q. And that's profit, isn't it. That's what they are looking at, is possible profit? The shrinkage takes place because of the difference in profit, isn't it?

A. Not always.

Q. Well, what other thing does bring that about, a decrease in the value of it? The same physical property, you said? They haven't changed any? I'm waiting for an answer.

A. What was the question, again? [1279]

(The reporter read the last question.)

Mr. Vitousek: Now, if the Court please, what is the question? Is the second part the question? It's the same thing we have been objecting to counsel making a statement after he asks the question. I think the question should be asked based on a certain assumption. Then the question is clear. But the question was asked and then another statement made which we don't know whether it's a question or not. It's made by counsel.

Mr. Rathbun: I think if you will listen you will find out whether it's a question or not. I think it's a question.

(Testimony of Stafford L. Austin.)

The Court: You have a habit of putting two questions at once.

Mr. Rathbun: Well, I'm explaining to him so he won't wander off to another subject. I have to do that.

The Court: I can understand that. May I have the last question again?

(The reporter read the last question.)

By Mr. Rathbun:

Q. Now, your physical properties haven't changed any?

Mr. Vitousek: Just a minute. Is this another question?

Mr. Rathbun: I'll make another question.

Q. Have they? A. Not at all.

Q. They weren't affected at all by these takes physically? [1280]

A. Physically, the same size.

Q. But you still say there's been a decrease in the value of the plant as a whole, including the lands and the machinery and everything in that mill, didn't you? A. That's right.

Q. Now, just what process is it that brings about that decrease?

A. You want me to go through the same thing that I did before?

Q. I don't know what you did. I want an answer.

Mr. Vitousek: If the Court please, he has answered that question several times and it's being repetitious, if he wants to go through it again.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: He hasn't answered that question.

The Court: Well, I'd like to have it answered again.

A. If you have a big plantation, you set it up for a certain tonnage, and you find yourself sooner or later with less tonnage than you can put through the mill efficiently, therefore the value of your whole plant has decreased, shrunk.

Q. Now, just what do you mean by "efficiently?"

A. Efficiently means getting the most out of the machinery involved.

Q. So that you'd get more tonnage?

A. That's right.

Q. And get more money? [1281]

A. Well, some more money. That's what you are in business for.

Q. That's right. That's what I thought. Therefore, you want to get more profit, all that you can get, by increasing the tonnage, don't you?

A. That's what we are in business for, to get some profit. If you didn't get profit you wouldn't go into business.

Q. That's right. And if you decreased the sugar acreage and the tonnage of cane that you put through the mill, you decrease the money that you will get for it, don't you, on that plantation?

A. You decrease the value to the stockholders of that plantation.

Q. And a man that was looking at it to buy it then would look to see whether or not with that equipment that you have, and with the cane area

(Testimony of Stafford L. Austin.)

that you have, he could have paid as much for it as he could have before, is that it?

A. That's it, yes.

Q. Now, would he at all consider the question of whether or not with that equipment as it is after these takings, with the cane land as it is in the same physical condition, would he consider at all the fact that he could only make a certain return on the amount of money that he paid for it?

A. He would certainly consider the amount of money he would make on it. [1282]

Q. Then he would judge what he could make in determining the amount that he could pay, wouldn't he?

A. That would be taken into consideration.

Q. It would be a big consideration, wouldn't it?

A. I imagine so.

Q. The controlling one, is that right?

A. He wouldn't go into business if he couldn't make a little money.

Q. Of course he wouldn't. Now, that difference in profit is what makes the difference in value, is it not, the difference in possible profit?

A. It is the difference between whether it's a going concern or it isn't.

Q. It's going, we'll all assume that.

A. It was in 19—when you are talking about, yes.

Q. It still is?

A. It's now going, yes, but it has lost its value. That's why it had to be sold.

(Testimony of Stafford L. Austin.)

Q. It lost its value because you can't make as much money on your investment?

A. A losing proposition.

Q. Because you can't make as much profit, that's the reason, isn't it?

A. Well, I imagine you have to get something out of it or you wouldn't operate it. [1283]

Q. Of course. But will you please answer my question? Read it again.

(The reporter read the last question.)

Q. Now, do you know what the last question is?

A. That a man wouldn't buy it until he knew there was some profit in it.

Q. That isn't my question. Of course, we'll all assume that. A man wouldn't buy it to lose money. Now, there's no use of wasting any more time on that.

The Court: I don't know what your last question is either. Will you state it again?

Q. Assuming the same capital investment, would a man pay more or less for it if three thousand acres of land were taken away and the profit thereby decreased on the equipment in that mill being as it is?

Mr. Vitousek: Now, if the Court please, that question is the same thing we have been objecting to as causing confusion. What is capital investment? Is he talking about the original capital investment, the purchase price of the new machinery, or what is he talking about? It is not intelligible, it is not an intelligible question that one could an-

(Testimony of Stafford L. Austin.)

swer, assuming the same capital investment and then take away land. You don't necessarily take away the capital investment. The investment remains the same. If someone comes along and buys it at a less figure, that's his capital investment. Now, what capital [1284] investment are we talking about? Is it the original investment of Honolulu Plantation, of a possible purchaser, or what? And we submit this question is not intelligible.

Mr. Rathbun: If there is any confusion in the witness' mind, I'll take Mr. Vitousek's statement for the question that the capital investment remained the same.

Mr. Vitousek: Well, it isn't Mr. Vitousek asking these questions. We submit the question should be framed so it is clear.

The Court: May we have the last question?

(The reporter read the last question.)

Q. Would he pay more or less?

The Court: The witness can answer. And you may have an exception. The witness can answer.

A. Pay less.

Mr. Rathbun: May we have an adjournment?

The Court: You said "adjournment." You meant recess?

Mr. Rathbun: I meant recess.

The Court: Yes.

(A short recess was taken at 12:15 p.m.)

After Recess

By Mr. Rathbun:

Q. Mr. Austin, in the properties that are in-

(Testimony of Stafford L. Austin.)

volved in these proceedings, you are familiar with them, aren't you, by case numbers, etc.? [1285]

A. I am. Call them out. I know where they are.

Q. The record shows what they are. Now, as to leases, you can use the Judge's map on this and you will be able to follow me on that.

The Court: Exhibit 8.

Q. Civil 514. That's under the Damon lease in evidence as Exhibit—I've forgotten what.

The Court: 9-G.

Mr. Rathbun: I think so.

Mr. Driver: 9-K.

The Clerk: 9-K is the Damon.

Q. All right. Now, 514, the land covered in that case, so far as the Honolulu Plantation Company is concerned, is covered by Exhibit 9-K, is it not?

A. With the exception of a small piece which is on Queen Emma.

Q. All right. That's how many acres, about, the small piece?

A. About six or seven acres, small.

Q. Six or seven acres? 521, that is not a Damon lease, is it?

The Court: 521?

Mr. Rathbun: 521.

A. 521?

Q. That's McGrew Point on the shore of Pearl Harbor there. [1286] A. Excuse me.

Q. Jutting out into the harbor there.

A. No, that's McGrew.

Q. Yes. That is not under the lease 9-K, is it?

(Testimony of Stafford L. Austin.)

A. No, it's not.

Q. 525 is, is it not? A. 525 is.

Q. 529 is not, isn't that correct?

A. 529 is not.

Q. 533? A. 533?

Q. The yellow up here? A. That is not.

Q. And 535? A. 535 is not.

Q. 544? A. 544 is.

Q. 548? A. 548 is.

Q. 527? A. Is.

Q. 532? A. 532 is not.

Q. And 536? A. 536 is not. [1287]

Q. And 540? A. Is not.

Q. 684? A. Is not.

Q. Now, in 514, 525——

A. Wait a minute. That's right.

Q. That is in? A. What's that?

Q. That is under the Damon lease, up to the margin of the Queen Emma land, right?

A. Yes, 684.

Q. Now, 514, 525, 544 and 548, 527 and 684, being leases from the Damon Estate, covered by lease 9-K, approximately how many acres are involved there as far as the Damon Estate is concerned?

A. Oh, that's about 300 acres, a little over.

Q. Isn't it more than that? There's 300 acres in 544, isn't there, 317?

A. Oh, yes. That's the first. Above that field is about 87 acres. That's field 84, and add that to it.

(Testimony of Stafford L. Austin.)

The Court: I don't think you are both talking about the same thing.

Mr. Rathbun: We are not.

The Court: He is asking you with reference to these cases where the Damon lease and only the Damon lease is involved, [1288] as total how many acres does the Damon lease include.

Q. I can shorten this by leading you and you can tell me if I am approximately correct or not, if it will help me, Mr. Austin. There's 257 acres involved in our taking in 514. Now, that's all Damon property, isn't it?

A. That's all Damon land, yes.

Q. Under the Damon lease?

A. That's correct.

Q. 525, same thing is true and that involves 216 odd acres, is that correct?

A. That's correct.

Q. 544, same is true, is it not? That involves 317 odd acres?

A. With the exception of a small piece in 81, in field 81. I mean there's a small piece of Queen Emma in there.

Q. How many acres, about?

A. I think there must be about 14 or 15 acres in that piece.

Q. Except for that, the rest of it is Damon land, isn't it? A. That's right.

Q. Under the Damon lease? A. Correct.

Q. 548, that's a wandering strip?

A. That's in the Salt Lake crater. [1289]

(Testimony of Stafford L. Austin.)

Q. Yes. That's all Damon, isn't it?

A. That's right.

Q. Sixty-three odd acres? A. Correct.

Q. And 527?

The Court: Twenty-seven?

Q. 527?

A. 91 and 107. There's over a hundred acres in there.

Q. That's Damon, isn't it? A. Damon.

Q. Well, the exact acreage on our taking in 527 is 93.355. That's all Damon? A. All Damon.

Q. And 684 comprises 29.891 acres. That's all Damon, isn't it? Pardon me, that isn't all Damon. It's Damon up to the Queen Emma limit.

A. Two pieces.

Q. And how many acres in the Damon part of it, if you can approximate it?

A. I know there were 19 acres in all, I think, but there may be four or five acres, the near portion.

Q. Four or five acres? All right. Somewhere in the neighborhood of 950 acres under the Damon lease in those cases, isn't that right?

A. That's correct, yes. [1290]

Q. Now, getting back again to your testimony as to the value of the remaining lands after the takings in these cases, if Honolulu Plantation Company on the date that you gave, June 21, 1944, had no lease, in other words, the lease had theretofore expired by its terms, you wouldn't charge anything up against the United States Government for any de-

(Testimony of Stafford L. Austin.)

crease in value because of that, would you, because of the takings in those cases?

A. That would reduce the takings if they had no lease.

Q. You wouldn't charge anything against us for that, then, would you?

Mr. Vitousek: If the Court please, there's a legal assumption there. We are going to argue this out.

Mr. Rathbun: That may be.

The Court: And because it is an assumption, he may answer it, and we will hear the argument later. Due to the rain, you will all have to speak louder than usual. I haven't clearly in mind an answer to that question; I think he gave one but I didn't get it. Did you answer it? If you haven't we will give you an opportunity to answer it.

The Witness: Yes, I answered it. I said if there was no lease then you wouldn't charge anything up against it.

Q. All right. Now, this question of how much you make on your capital investment, or whatever you call it, money in property, again it is a variable thing, it changes, does it not? [1291]

A. It changes from year to year.

Q. It depends on a number of things, like labor costs; those change, don't they?

A. Labor cost, yes.

Mr. Vitousek: That's been asked and answered already several times before. We have gone into labor cost change and various other elements.

The Court: Well, in a slightly different way.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: In a different purpose.

The Court: You are asking about charges against labor?

Mr. Rathbun: Labor. Labor varies quickly?

A. Labor costs do vary.

Q. And likewise the variance of those labor costs is an element that affects the amount of profit that can be made, is that right? A. Correct.

Q. Price of sugar varies, does it not?

A. It does.

Q. Likewise the variance in that price has its effect upon the amount of money that can be made, does it not? A. It has.

Q. The question of management also affects it, affects it, does it not? A. It does.

Q. Now, to that extent these things are speculative, more or less, being variable? [1292]

A. Well, you can forecast pretty well what is going to happen.

Q. You can't do it accurately, can you?

A. Pretty accurately. I have been doing it for 25 years.

Q. Supposing there was a strike that took place in which they raised the wages a hundred percent, is that something that you could forecast next year?

A. We probably could forecast we are going to have another strike next year, and the price of sugar would go up.

Q. And did it go up that much?

A. A hundred dollars a ton.

Q. Percent, wages?

(Testimony of Stafford L. Austin.)

A. No, you couldn't very well forecast that.

Q. Of course you couldn't. One man with his ability, or one set of men with their ability might take the same equipment that you have in the Honolulu Plantation Company plant and make ten or twelve percent on the investment, while another man with lesser ability, management ability, might take the same equipment and lose money, isn't that possible?

A. It depends on what kind of equipment. If you take—when was it, when do you want it?

Q. Any time. A. Any time?

Q. That could vary, couldn't it? [1293]

A. Oh, it could vary, yes.

Q. Management has a great deal to do with it?

A. It has something to do with it.

Q. Now, again calling your attention to this table 1 in connection with the claim filed in Congress, which you participated in as you have said, under the heading "Plantation Grown Cane," does that refer to sugar production?

A. It refers to sugar production.

Q. But at first it refers to the sugar production raised on the Honolulu Plantation Company land, etc., leased or in fee? A. Correct.

Q. There's another column of sugar bought from outside people? A. Outside raw.

Q. So the figure you testified to pertains to plantation grown cane? A. That's it.

Mr. Vitousek: If the Court please, that is not clear either, because this isn't it. He pointed out

(Testimony of Stafford L. Austin.)

under this heading refined sugar produced from plantation grown cane. The figures are not cane. They are sugar producing cane.

Mr. Rathbun: That's right.

Mr. Vitousek: He said he referred to figures and he referred to plantation grown cane. We are a little interested in this record, too. [1294]

Mr. Rathbun: Well, I'm satisfied with this cross-examination. You can put what you please on those.

Mr. Vitousek: Well, under all rules——

The Court: I think it's clear now. Proceed.

By Mr. Rathbun:

Q. In the year 1931, on 5,547 acres of cane under cultivation the Company had a net income available for interest on its investment of \$168,479, is that correct? (Showing a document in evidence to the witness.) A. 1931?

Q. 1931. A. Yes.

Q. In the year 1941, on 4,614 acres of cane under cultivation, they had a net income available for interest on their investment of \$187,140.46, is that correct? A. That's correct.

Q. And in that year of '31 you brought into the plant, 10,491.05 tons of outside raw sugar, didn't you? A. Correct.

Q. And in 1941 you brought in outside raw sugar to the extent of 8,684.4 tons?

A. Correct.

Mr. Rathbun: I think that's all, your Honor.

The Court: Redirect?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: If the Court please, I'm going to have to [1295] check these records now on the areas taken under these various suits in cross-examining, and I suggest we recess until tomorrow for redirect.

The Court: Do you have any objection?

Mr. Rathbun: No, your Honor. I think we might save time.

The Court: We'll adjourn, then, for the day, resuming tomorrow morning at nine.

(The Court adjourned at 12:50 p.m.)

Honolulu, T. H., December 10, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready.

The Court: Mr. Austin, I will remind you that you are still under oath. And you are ready for redirect examination.

STAFFORD L. AUSTIN

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Redirect Examination

By Mr. Vitousek:

Q. I asked you yesterday, Mr. Austin, to check through the records of the company to get the exact

(Testimony of Stafford L. Austin.)

acres taken in these various suits, and you have handed me some summaries this morning. Were these prepared by you or under your direct supervision and check? (Showing several sheets of paper to the witness.) A. They were.

Q. The first here is what you headed the "Main Hickam Field Taking." What suit is that in?

A. That's Civil suit No. 289. [1297]

Q. Was that the first Hickam Field taking?

A. That was the first Hickam Field taking.

Q. What does this schedule show?

A. That there was 638.25 acres taken in——

Q. What kind of land?

A. Bishop Estate land, 172 acres; Queen Emma Estate land, 344½ acres; and Damon Estate land, 121.75 acres, making a total of 638 and a quarter acres.

Q. Was that cane land or——

A. That was all cane land.

Q. What was the total acreage involved?

A. The total acreage involved was 760 acres.

Mr. Vitousek: If the Court please, we offer this in evidence.

The Court: Any objection? Hearing none, the same may become——

The Clerk: Honolulu Plantation Exhibit No. 10.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 10.)

[Printer's Note: Exhibit No. 10 is set out in full at page 1534 of this printed Record.]

(Testimony of Stafford L. Austin.)

Q. Do you recall when that land was taken from the control of the company? A. 1935.

Q. Thirty-five? You mentioned yesterday preparation of a claim before Congress. Was this taking the subject of that claim? [1298]

A. No, it was not.

Mr. Driver: You say this taking. You mean what?

Mr. Vitousek: Referring to the exhibit, the first Hickam Field taking.

Q. Now, I show you here a schedule headed "Prior Consolidated Takings." Was that schedule prepared by you or under your direct supervision? (Showing a sheet of paper to witness.)

A. It was.

Q. Did you check it? A. I did.

Q. What takings and what suits are the takings there shown involve?

A. Civil Suit No. 416. There was Queen Emma land, 67.20 acres—this is cane land; Bishop Estate cane land, 73.06 acres.

Mr. Driver: Where's that on here? Just a minute.

A. Or a total of cane land for the suit, 140.36 acres. In Civil Case No. 430, Bishop Estate, 17.58 acres; Civil Suit No. 434, Damon Estate, 70.96 acres, total for the suit in cane, 70.96. Civil Suit No. 436, Damon Estate, 244.47 acres in cane; total for the suit in cane, 244.47. Civil Suit No. 442, Queen Emma Estate, 110.8 acres; total for the suit in cane was 110.48 acres. Four hundred fifty-two,

(Testimony of Stafford L. Austin.)

Bishop Estate, point 67—correction, 67.29 acres total cane in the suit. Making a grand total of cane land in the suit of 651.04 acres. [1299]

Q. Now, referring again that that schedule—

The Court: Excuse me a minute. A grand total in all of those cases?

The Witness: Of cane land, yes, of 651.

The Court: From the first Hickam Field taking to the last?

Mr. Vitousek: No, if the Court please, from 416 to 452.

The Court: All right.

Q. Referring to this schedule you have in your hand, it has the number of cases involved in which the takings are involved as shown on the schedule, is that right? A. That's right.

Q. And the owner, it has the owner of the fee simple? A. That's right.

Q. And the total acres in suit, that doesn't correspond with your cane total. Were there others?

A. No, because there's waste land and other areas involved.

Q. Then you show the cane field number. What does that refer to?

A. That refers to the number of the cane fields that are shown on the plantation map.

The Court: Exhibit 1, that map?

The Witness: Exhibit 1.

Q. Then the date taken? [1300]

A. There's the date of the suit.

Mr. Vitousek: If the Court please, we offer this exhibit in evidence.

(Testimony of Stafford L. Austin.)

The Court: Any objection? Hearing none, the same may become——

The Clerk: Honolulu Plantation Exhibit No. 11.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 11.)

[Printer's Note: Exhibit No. 11 is set out in full at page 1535 of this printed Record.]

Q. Mr. Austin, referring you to Exhibit No. 6 introduced in this case, which shows the details of the areas taken——

The Court: In these 13 cases?

Mr. Vitousek: Presently before the Court.

Q. I asked you to make a summary showing the details by owners of the total by owners of cane land taken. Did you do so?

A. I did so, yes.

Q. I hand you a statement here, "Summary From Exhibit 6"; in general terms what does that show?

A. It shows that suit 514, Damon land, 119.21 acres; Queen Emma, 15.28 acres—that's all cane land; 521, no cane; 525, Damon, 66.82 acres; 527, Damon, 85.74 acres; 529, Bishop Estate, 176.67 acres; Hawaiian Land and Improvement Company, 103.64; McCandless, 3.25; fee, .18.

Q. What is that fee you refer to?

A. That's Honolulu Plantation Company fee.

Q. All right. Go ahead.

A. 532, no cane; 533, Oahu Sugar Sublease, 48.61 acres; 535, that's suit 535, 131.893 acres for Bishop Estate; McCandless, .545; fee, 2.732.

(Testimony of Stafford L. Austin.)

Q. That refers——

A. To the Honolulu Plantation Company.

Q. All right.

A. 536, no cane; 540, no cane; 544, Damon, 294.01; 548, Damon, 25.30; 584——

Q. 584? A. Yes.

Q. Is that 5 or 6?

A. I mean 684. My mistake. Damon, 3.93; Queen Emma, 6.51; Bishop Estate, 3.27. The totals for those, for all those cases with respect to the landowners, was, Damon, 595.01 acres; Queen Emma, 21.79 acres; Bishop Estate, 311.833 acres; Hawaiian Land and Improvement Company, 103.64; McCandless, 3.795; Oahu Sugar Sublease, 48.61; fee, 2.912. Grand total, 1087.59 acres.

Mr. Vitousek: If the Court please, we offer this summary in evidence.

The Court: It may become the company's exhibit next in order.

The Clerk: Honolulu Plantation Exhibit No. 12.

(The document referred to was received in evidence [1302] as Honolulu Plantation Company's Exhibit No. 12.)

[Printer's Note: Exhibit No. 12 is set out in full at page 1537 of this printed Record.]

Q. Mr. Austtin, referring to the first Hickam Field taking,—that was suit 289—will you state whether or not the company was able to secure any additional cane lands after that suit?

The Court: That's the first Hickam Field taking? Do you have the question in mind?

(Testimony of Stafford L. Austin.)

The Witness: I have the question.

The Court: You may answer.

A. After the Hickam Field taking, the Honolulu Plantation Company—and after the leases were set with the various estates in 1936—proceeded to take in more land on the upper stretches of the plantation. Before the Hickam Field taking the plantation was operating at 550 feet, at a 550 foot elevation, was the top limits of the fields. They then revamped their water system and proceeded to take in the lands from the 550 foot level to 650 foot level. And in that way, at the time of the next takings, the plantation area was about up to where it was before the taking, the Hickam Field taking.

Q. Yesterday, Mr. Austin, you were asked the tonnage produced out of the plantation, I recall in 1924 and subsequent dates. I'd like to have you give the tonnage in between those dates.

Mr. Rathbun: May I have that question?

(The reporter read the last question.) [1303]

Mr. Rathbun: Between what dates?

By Mr. Vitousek:

Q. Before you answer that question, what was the year? I believe that you gave yesterday '24, I think. A. 1924.

Q. What was the figure?

A. 20,220.62 tons.

Mr. Rathbun: What year is that?

The Witness: 20,220.62 tons of refined sugar from plantation owned cane.

(Testimony of Stafford L. Austin.)

Q. Now, what was the last figure you gave yesterday?

A. 1943, I think, was the figure I gave yesterday.

Q. Well, I want to get those in between those dates.

Mr. Rathbun: Well, in between what?

Mr. Vitousek: 1924 and 1943.

Mr. Rathbun: You haven't said that yet.

A. From plantation owned cane only?

Q. Well, what have you? Do you have plantation owned cane? Is there other cane?

A. Sugar from outside raws.

Q. On outside raws?

A. And some sugar from outside cane.

Q. Well, give all figures in totals. Before you give that, does that refer to refined sugar or raw sugar?

A. Refined. [1304]

Q. But not to cane? A. Not to cane.

Q. It is the amount produced?

A. From cane.

Q. Or amount purchased?

A. Outside raw.

Q. All right.

The Court: Excuse me. Haven't we already got that as from '29 to '43 when he was talking about the mill's capacity? The other dates were talked about another time.

(Discussion off the record.)

Mr. Vitousek: I'll withdraw that question.

Q. I will ask you first, Mr. Austin, to give the

(Testimony of Stafford L. Austin.)

tonnage of refined sugar manufactured from cane raised by the plantation in the years—does that include '29?

The Court: Yes.

Q. —from the years 1924 to 1928 inclusive?

A. 1924, 20,220—correction, 20,220.62 tons; 1925, 22,627.10 tons; 1926, 26,654.67 tons; 1937, 30,545.93 tons.

Mr. Rathbun: Just a minute now. Take it easy on those figures. What is the last figure?

(The reporter read the last figure.)

A. 1928, 34,653.17 tons.

The Court: Just a minute. Those figures then will fit on to the figures you gave yesterday when you were talking about [1305] the capacity of the mill, and it was in connection with cross-examination that you gave all of those figures, so that those yesterday and the ones you are giving today in terms of tonnage from 1924 to 1943 inclusive represent refined sugar made from cane you grew on the Honolulu Plantation?

The Witness: That's right.

The Court: It is exclusive of raw sugar that you bought?

The Witness: Exclusive of raw sugar, outside cane.

Q. Now, Mr. Austin, you stated you purchased some cane during that period?

A. Yes, some cane during the period.

Q. Would you give the amount of refined sugar manufactured at the Honolulu Plantation Com-

(Testimony of Stafford L. Austin.)

pany from outside cane purchased? What years did that occur?

A. 1926, 1927. You want me to give the tonnage along with it?

Q. Yes, give the tonnage and the years purchased. A. 1926, 825.28—

Mr. Rathbun: Eight?

The Witness: Yes.

A. —tons of sugar made from cane, cane purchased on the outside.

The Court: That's white sugar?

The Witness: Yes, refined.

A. (Continuing): 1927, 970.82 tons of sugar from outside [1306] purchased cane; 1928, 526.11 tons; 1929, 412.31 tons; 1930, 244.48 tons.

Mr. Rathbun: What is the last figure?

The Witness: 244.48.

A. (Continuing): 1931, 56.87 tons; 1932, 237.70 tons.

Mr. Rathbun: Now, wait a minute. You're going too fast, please.

The Court: Can't you ask him nicely?

Mr. Rathbun: Will you give me the next to the last one, 1930?

(The reporter read the last figures requested.)

A. (Continuing): 1933, zero; 1934, 55.33 tons; 1935, 49.01 tons; 1937, 58.20 tons.

Mr. Rathbun: What about '36?

The Court: 1936?

A. Oh, 1936, zero.

The Court: 1937 again?

(Testimony of Stafford L. Austin.)

A. 58.20 tons; 1938, zero; 1939, 41.09 tons; 1940, 40.93 tons; 1941, zero; 1942, 4,114 tons.

The Court: Once again?

A. 4,114.98 tons; 1943, 724.10 tons.

Mr. Rathbun: Just a minute, please. Will you give me '43 again?

(The reporter read the 1943 figure.)

By Mr. Vitousek:

Q. Mr. Austin, the purchases prior to 1942 were made [1307] from what type of grower, what type of grower? A. Prior to when?

Q. 1942.

A. Prior to 1942 was from—Mr. McCandless had seven and one-half acres of cane land right next to the plantation and we ground his cane. And also before that time we received cane from way over next to Waialeale Boys School; used to come across by Libby, McNeill and Libby's cane; they grew some cane there and they used to send it to us in big gondolas and we ground it for them. And that's where we got the cane from.

Q. Well, is that cane now available?

A. No, no cane available now.

Q. Now, in 1942 your figures show a large amount of sugar produced from cane. Where did you get that cane?

A. In 1942 we went over and helped Oahu Sugar Company take off some of their fields right next to the Honolulu Plantation Company, and that's where the large tonnage of—

Q. Well, how did you happen to do that?

(Testimony of Stafford L. Austin.)

A. — Waipahu was. Oahu Sugar Company was behind and at the same time we were running under capacity, so we agreed to help them harvest their cane. Instead of taking it over to Waipahu where they were running to full capacity, we took it to Aiea and ran it through our mill on a contract arrangement. And that was the same, that was true of 1943 when we took 724 tons of sugar off Oahu Sugar Company. [1308]

Q. Well, any particular reason or occurrence causing them to be behind in '42, the Oahu Sugar Company? A. In 1942?

Q. Yes.

A. Well, the reason they were behind in 1942 was on account of the blitz and the fact that they had to in 1942, had to send a great many of their men out to help the Army do their work on the various projects that they had.

The Court: Just a minute before you go further. I'm confused on this sugar business. I understand your figures about refined sugar from your own cane. Now you have been talking about cane purchased from other places and ground into refined and white sugar.

The Witness: Yes.

The Court: I was under the impression that you also told us yesterday about some raw sugar that you acquired.

Mr. Vitousek: We are coming to that next. There are three categories.

The Court: Three categories?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: Yes.

Q. Well, can you state whether or not you would be able to purchase cane as shown there in '42 and '43 at other dates if the war was over?

A. No, there's no market, no cane on the market that one could buy unless—— [1309]

Q. Now, Mr. Austin, you also testified as to purchase of raw sugar to make refined sugar from at the Honolulu Plantation Company mill. Would you give—I'll withdraw that. When did you first start purchasing raws?

A. When did we first start purchasing raws?

Q. Yes.

A. Well, the refinery was started in 1907.

Q. Seven? A. Seven, yes.

Q. Well, commencing with comparable years, 1924, would you give the quantities of refined sugar made from raw sugar purchased by the Honolulu Plantation Company?

A. 1924 is 189.01 tons of sugar, refined sugar made from outside raws; in 1925 there was 1613.45 tons; 1926, 649.55 tons.

The Court: A little slower.

A. (Continuing): Twenty-seven, 983.40 tons; '28, 375.72; 1929, 620.40 tons; 1930, 10,234.50 tons; 1931, 10,491.05 tons; 1932, 10,081.45 tons; 1933, 12,126.85 tons; 1934, 11,256.20 tons; 1935, 12,130.55 tons; '36, 13,102.85 tons; '37, 9,788.85 tons; 1938, 7,947.45 tons; '39, 8,769.25 tons; 1940, 8,747.75 tons; '41, 8,684.60 tons; '42, 19,042.48 tons; '43, 28,942.40 tons.

(Testimony of Stafford L. Austin.)

Q. Now, Mr. Austin, prior to 1942, running back from '41 inclusive, where did the Honolulu Plantation Company purchase its raws? [1301]

A. From Waimanalo Sugar Company, total output of Waimanalo Sugar Company, and infrequently from, a little from Waialua, some independent planters had.

Q. Any other place? A. What was that?

Q. Any other place?

A. And from Kaeleku Sugar Company.

Q. You testified that sugar from Kaeleku is no longer available? A. That's right.

Q. How about these planters at Waialua?

A. They are no longer, they have gone out of existence, too.

Q. And in 1942, which shows a sharp increase, 1942, 1943, you testified those sugars were secured from Oahu Sugar Company?

A. From Oahu Sugar Company and other plantations on this island. They were purchased direct from California and Hawaiian.

Q. That's under the arrangement you testified about previously on direct? A. Yes.

Mr. Vitousek: That's all, if the Court please.

The Court: Recross? [1311]

Recross-Examination

By Mr Rathbun:

Q. When you testified to Exhibit 10, the acreage **taken on the Hickam Field take**, what year did you have in mind that that taking took place?

(Testimony of Stafford L. Austin.)

A. In what year?

Q. Yes.

A. That's 1935 or '34, I'm not sure which is the exact date.

Q. How many acres did you say there were on that take? A. Six hundred, 651 I think I said.

Q. Did you give 638.25? A. 638.25?

Q. On this Exhibit 10. A. Yes.

Q. What other Hickam Field take was there? You say that's the first take? A. Yes.

Q. What other take was there at Hickam Field?

A. There was field 96 and 95. I think there were—are you familiar with the map?—field 95 and part of 96.

Q. How many acres?

A. For a housing layout.

Q. When were those taken?

A. Those were taken, they were taken right after field [1312] 81, about 1940, or '41, I'm not sure.

Q. Well, then, they are included in the takes shown on Exhibits 10, 11 and 12, is that it?

A. Ninety-five taken, shown in the 434.

Q. O.K. And they are on those exhibits?

A. That's right.

The Court: Civil 434?

Q. And what fields are involved in this first Hickam Field take? A. In the first?

The Court: Exhibit 10.

A. Ninety-eight, ninety-nine.

(Testimony of Stafford L. Austin.)

Q. How about 97? A. One hundred.

Q. Wait a minute.

A. Ninety-seven, old ninety-seven.

Q. Field 97?

A. Old 97. They changed the numbers.

Q. O.K.

A. One hundred one, 102, 103, 104, 105, 106 and a portion of 107.

Q. Now, you say those were not included in the claim before Congress?

A. No, they weren't.

Q. Are you sure of that, are you? [1313]

A. Yes, I'm sure about that.

Q. Don't you know that Mr. Schmutz made those a table 5 in connection with that claim, set forth those very fields with a total of 614 acres in your claim to Congress?

A. You will have to ask him about that.

Q. Well, I'll show it to you. You collaborated in the making of this, didn't you?

A. Yes, I helped.

Q. You said yes you did?

A. Yes, I helped make it.

Q. Then you looked it over, didn't you? You looked it over before it was filed? (Showing a document in evidence to the witness.)

A. Yes. He has them down here, yes, 614 acres.

Q. Well, that's an exhibit used by Mr. Schmutz in presenting your claim to Congress, isn't it?

A. That is.

Q. That's his material—right?

(Testimony of Stafford L. Austin.)

A. That's right.

Q. You knew about it, didn't you, when it was filed?

A. I knew about it.

Q. Did you forget about it now?

A. No, but it wasn't used in any, as far as I know it wasn't made—it's part of the record there but it wasn't included in the damages. [1314]

Q. These things were all included by Mr. Schmutz to illustrate the basis of his claim?

A. I imagine so.

Q. You know that, don't you?

A. I don't know exactly what he was thinking about when he made it.

Q. Well, he certainly had no purpose in thinking about anything except to help you put a claim to Congress, did he?

A. That's probably right.

Q. And anything that he used was for that purpose, wasn't it.

A. I imagine so.

Q. Now, you gave the tonnage in 1924 of 20,220.62 acres as representing cane or sugar produced from cane grown on Plantation fields, is that right?

A. That's right.

Q. You gave the years '25, '26, '27 and '28, right?

A. Correct.

Q. Why did you stop there? Did you have any reason for that and not go on through to '43?

A. Because the Judge asked me to stop.

The Court: You understand that situation? He gave the figures from there on yesterday.

Mr. Rathbun: I don't know whether he did or

(Testimony of Stafford L. Austin.)

not. The figures he gave this morning disagree with these. [1315]

The Court: Well, the reason he stopped was that was that I asked him if the figures from there on were the same ones he gave yesterday, and he said yes.

Mr. Rathbun: They weren't the same this morning as he gave yesterday.

Mr. Vitousek: Well, if the Court please, they are talking from two different figures.

The Court: There is even some confusion in my mind on the point. But that's why he stopped.

Mr. Rathbun: I can straighten it out.

The Court: Go ahead.

By Mr. Rathbun:

Q. Now, what was your tonnage from plantation grown cane in 1925? A. 22,627.10.

Q. And in '26? A. Was 26,654.67.

Q. Now, is that the same amount that you represented to Congress was produced from plantation grown cane in your claim filed?

A. I wouldn't know. This is from our annual reports, and those——

Q. I don't know which is right.

A. ——and those may have a carry-over one way or another.

Q. I don't know what they have. [1316]

A. These are right. All I know about.

Q. All right. You wanted to make these right when you represented this to Congress, didn't you?

A. Oh, I imagine so, but I didn't make these up.

(Testimony of Stafford L. Austin.)

Q. Well, I don't know.

A. Some person in the office made them up, and I didn't check every figure that they made. These are made by myself and I'm sure of these. (Referring to another document.)

Q. In 1926 this shows 27,661.60, doesn't it?

The Court: Just a minute. There are too many "these" and "this" without identification.

Mr. Rathbun: Well, I refer to the claim to Congress.

The Court: And when the witness talks?

Mr. Rathbun: Specifically, on table 1, exhibit attached to that claim.

The Court: Just a minute. The witness talks about a book that he has in his hand.

Mr. Rathbun: Well, I'm not interested in his book.

The Court: No, but I want the record straight.

Mr. Rathbun: But I'm asking the questions, your Honor. My question is directed to this right here.

The Court: Just a minute. He said "these" he knew to be correct, and he referred to the book he had in his hand from which he gave us the figures this morning.

Mr. Rathbun: Yes. [1317]

The Court: I simply want to get these identified in the record. You talk about "this". I want that identified in the record as the document you are holding in your hand, namely, some Congressional claim.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Which I have identified as table 1.

The Court: That's right. The other document should be identified, too.

Mr. Rathbun: I'm not going to be bound by this. I don't want to be bound by what he's got in his hand.

The Court: Proceed.

By Mr. Rathbun:

Q. In 1926, you showed that in the representation to Congress as being 27,061.60, did you not?

A. Twenty-six — (Looking at Mr. Rathbun's document)—that's 1927, twenty-seven thousand—

Q. That's twenty-six. A. Yes, 27,061.

Mr. Vitousek: What was that year, please?

Mr. Rathbun: Twenty-six.

The Witness: 1926.

Q. In 1927, your representation to Congress was 31,028.45, was it not?

A. That, of course, shows it in the book.

Q. Well, that's what you represented to Congress, wasn't it? That's my question. [1318]

A. What we represented to Congress?

Q. Yes. This was filed with Congress, wasn't it?

A. Yes, that's what we represented.

Q. You meant to stand on those figures to them, didn't you? A. Correct.

Q. All right. 1928, you represented to Congress that the tonnage was 35,028.89, is that correct? Did you? A. Where on the sheet is that?

(Testimony of Stafford L. Austin.)

Q. It was filed in Congress, wasn't it?

Mr. Vitousek: What was that figure?

Mr. Rathbun: 35,028.89.

Q. Now, you stopped in '28. Now, in '29 your claim to Congress shows 32,128 tons, is that right?

A. That's right.

Q. In 1930 it shows 31,720.1?

A. That's right.

Q. In '31 it shows 29,748.55?

A. Correct.

Q. In '32 it shows 31,283.95—correct?

A. Correct.

Q. In '33 it shows 30,008.55—correct?

A. Correct.

Q. In '34 it shows 23,168.37—correct?

A. Correct. [1319]

Q. In '35 it shows 26,357.99?

A. Correct.

Q. In '36 it shows 27,296.3?

A. That's correct.

Q. In '37 it shows 27,640.35?

A. Yes.

Q. In '38 it shows 25,559.70?

A. That's right.

Q. In '39 it shows 26,260.75?

A. Correct.

Q. In 1940 it shows 24,784.6?

A. Correct.

Q. In '41 it shows 24,088.25?

A. Yes.

Q. In '42 it shows 16,329.24?

A. Right.

(Testimony of Stafford L. Austin.)

Q. In '43 it shows 20,525.15?

A. Correct.

Q. And in '44 it shows 13,689.3?

A. Correct.

Q. Now, in the same manner that you answered as to the tonnage up to 1928 what do your figures show that you have testified about in relation to those and in relation to the ones after '28? For these different years.

A. For these different years? The Judge has them. [1320]

Q. Well, from your book, the same as you gave them in '28? A. Thirty-four.

Q. Let's take '29. A. 31,912.99.

Q. That's different than it was represented to Congress, isn't it?

A. Yes, it's not the same.

Q. And in 1930? A. 31,475.62.

Q. That's a different figure, is it, than in the claim to Congress? And '31?

A. 29,691.63.

Q. And that's a different figure than in the claim to Congress, is it not? A. It is.

Q. And '32? A. 31,046.25.

Q. And that's a different figure than the claim to Congress—right? A. That's right.

Q. Thirty-three? A. 30,008.55.

Q. That's the same. 1934? A. 23,168.37.

Q. Thirty-five? A. 26,357.99.

Q. Now, that isn't '36, that's '35?

The Court: For the year 1935 the figure again is?

A. 26,357.99.

(Testimony of Stafford L. Austin.)

Q. Now '36? A. 27,296.30.

Q. And '37? A. 27,640.35.

Q. Thirty-eight? A. 25,559.70.

Q. Thirty-nine? A. 26,219.66.

Q. That's a different figure than the claim to Congress, isn't it? A. Nineteen what?

Q. 1939. A. Yes.

Q. 1940. A. 24,743.67.

Q. That's a different figure, is it?

A. Yes.

Q. Forty-one? A. 24,088.25.

Q. Forty-two? [1322] A. 16,329.24.

Q. Forty-three? A. 25,025.15.

Q. And '44? A. 13,689.

(Discussion off the record)

The Court: All right. We'll take a recess now.

(A short recess was taken at 10:08 a.m.)

After Recess

By Mr. Rathbun:

Q. Mr. Austin, in the replies to these questions as to the sugar produced from plantation grown cane, you have been using a book in your hands that you have figures on? A. Correct.

Q. Of some kind. I have been showing you exhibits attached to the plantation claim with Congress, haven't I? A. Correct.

Q. You understood that, didn't you?

A. I did.

Q. Now, there are some differences in your figures and these Congressional claim figures, aren't there?

(Testimony of Stafford L. Austin.)

A. On the first figures, but the total is all the same.

Q. But the figures I asked you about, there is a difference? A. There's a difference, yes.

Mr. Rathbun: Now, if your Honor please, I have no objection to the Court looking at it. We can't offer it in evidence at this time, of course. If they are willing to, they can put this in evidence and then we will have the claim in front of us.

Mr. Vitousek: If the Court please, I don't know when the rule prevents them from offering evidence in cross-examination when they are showing to the witness the difference between his figures to explain it. We are not going to offer in evidence something that the Government is producing in our case.

Mr. Rathbun: It's their document.

The Court: There is nothing for me to rule on.

Mr. Rathbun: Well, I am perfectly willing to do it and perfectly willing to put it in evidence. If the Court rules that it is proper for me at this time to do it, I will do it. Then your Honor can have this and look at it as we go through it.

The Court: Are you making an offer of it?

Mr. Rathbun: I will, yes, your Honor.

The Court: Of the whole document?

Mr. Rathbun: The whole document as it was filed in Congress.

The Court: Now that the document is offered by the Government, what is your position? [1324]

Mr. Vitousek: If the Court please, we think it ought to be first identified with the witness. He is

(Testimony of Stafford L. Austin.)

showing him only one exhibit. If they are offering it, it's got to be proved in some way.

Mr. Rathbun: Certainly. Will you look at it, Mr. Austin?

Mr. Vitousek: I don't want to have any misapprehension here. This document was changed, as I understand it, before it was filed before the committee, and I just state that to counsel because we will have to show that this is not the correct document. It has been changed.

Mr. Rathbun: This was filed, wasn't it, with the Congress?

Mr. Vitousek: There was a document filed. I don't believe it's this one. I am informed by Mr. Kay that this is not. There were amendments made to it.

Mr. Rathbun: You mean this wasn't filed?

Mr. Vitousek: This particular document, no.

Mr. Rathbun: Was never filed?

Mr. Vitousek: If the Court please, I didn't have anything to do with the case. Mr. Kay says it was amended before it was filed. That's the statement I am making. I can't say because I wasn't in the case to handle that claim. Mr. Kay informs me that there were changes made in it. Now, if it is offered, I'll have to go into that first. If counsel wants to save the time of the Court, I'll be glad to go through this [1325] and see if it is the same, and then we can decide whether we will object to it or not. But otherwise we will have to—this witness did not prepare it and he is still testifying.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: If Mr. Kay is sitting in the court-room—I don't know whether this should go in the record or not—we can facilitate this. That's all.

The Court: Go ahead.

Mr. Rathbun: What I'd like to know is whether or not that document was filed and then if you did file any amendment it was filed after that was filed? But this was filed with Congress?

Mr. Vitousek: If the Court please, may I have a moment? If the Court please, Mr. Austin has testified that he did not prepare this document, and I would suggest that it be marked but not received because we object to it being received at this time as a whole except that portion which he has testified to, as he did not prepare the document according to his own testimony. I don't know whether this is the one that was filed or not until we check it, and apparently no one here actually handled it. It was handled by Mr. Courtney, an attorney in Washington. I'd have to check it with the copy that we have, as obviously there are some changes because they note them on this; that this witness has already testified he didn't prepare the document. So we think it is improper to be received in evidence.

Mr. Rathbun: I can't force any other action on it than that. But to help straighten the Court out I am willing to have that marked for identification, then, that sheet that I was asking those questions from, table No. 1, in connection with the letter of Mr. Schmutz which refers to all of these exhibits, including table 1. He was the appraiser. He ad-

(Testimony of Stafford L. Austin.)

dresses a letter to the Honolulu Plantation Company under date of March 28, 1945.

The Court: Does that have a page?

Mr. Rathbun: It hasn't a page number. But his material starts with page 1 thereafter and goes right straight through and he refers to these exhibits. There is no secret about it, Judge. Take a look at it. (Showing book referred to to the Court) As far as I am concerned, there isn't any secret about it.

The Court: Well, at the moment the only thing that can come in apparently is this table 1, to show the figures from which you read.

Mr. Rathbun: Well, I did ask questions about other things way back in the cross-examination on that, in other tables. That's the one that we were at this morning.

The Court: Yes. That's table 1 in this Congressional claim, and it may be marked.

Mr. Rathbun: For identification?

The Court: For identification. [1327]

The Clerk: That's Government's Exhibit 1 for identification.

(Document referred to was marked "Government's Exhibit 1 for identification.")

Mr. Rathbun: Now, this is in my custody now. I don't know whether—

The Court: We'll hold you responsible for it, if you want to use it further.

Mr. Rathbun: If somebody accuses me of making changes on it—

(Testimony of Stafford L. Austin.)

Mr. Vitousek: We won't accuse him.

The Court: I don't think anyone will accuse you of anything like that.

Mr. Rathbun: We can make a copy of it or put it in as it is.

The Court: All right. But no one will suspect you of making any changes.

Mr. Rathbun: Having a document in evidence in your custody, and if something comes up on it—

The Court: Well, it isn't in evidence but it is marked for identification.

Mr. Rathbun: It is marked for identification, however. Does that straighten your Honor out on what you asked about?

The Court. All right. The theses are now straightened out. [1328]

Mr. Rathbun: All right.

The Court: That's all I wanted to do before.

Mr. Rathbun: I thought it was plain to the Court.

The Court: You get so wrapped up in what you are doing that you forget sometimes that there are confusing points to others, and I simply wanted to straighten it out.

Mr. Rathbun: I had my mind on my point. I knew he was using something other than this and I wanted to show the discrepancy. That's all.

The Court: Well, don't argue with me all over again. I was just trying to see what I wanted.

Mr. Vitousek: Is that all?

Mr. Rathbun: That's all.

(Testimony of Stafford L. Austin.)

Re-redirect Examination

By Mr. Vitousek:

Q. Mr. Austin, you testified in regard to tonnage from the figures that you had in the book that you carried with you. Can you state the nature of that book, what, how it was made up by you, and what you use it for or used it for?

A. It was a personal little black book that has all kinds of dope in it about plantation and various figures that I like to keep, I have always liked to keep in touch with.

Q. Did you use that in your work as manager?

A. In my work as manager.

Q. And in your present work? [1329]

A. It is.

Q. Now, there's been marked here for identification what is known as table 1, headed "Historical Date". I guess this must be wrong, too. It should be "data". "1908-1944, Honolulu Plantation Company." Now, during the recess I asked you to check totals. You said that the totals were the same. What do you refer to as the totals?

A. Total tons of sugar, refined sugar produced by the factory.

Q. And what did those totals include?

A. Tons of refined sugar from outside cane, tons of sugar from outside raws, and tons of sugar purchased from cane grown by the plantation.

(Mr. Vitousek shows a small book to Mr. Rathbun)

(Testimony of Stafford L. Austin.)

Q. Now, Mr. Austin, I hand you here what is headed "1928, Thirtieth Annual Report of Honolulu Plantation Company, for the year ending December 31, 1928." Is that a printed publication put out by the company? A. It is.

Q. Put out annually? A. It is.

Q. What in general does it show?

A. The manager's report and then the financial statement in the end, and crop data of various kinds, weather data.

Q. Well, now, turn to page 12. What is the information [1330] shown on page 12?

A. Yield per acre, plantation and outside cane.

Q. And outside cane. Now, does that show the total yield of refined sugar from cane grown by the plantation on plantation controlled land?

A. It shows the refined sugar, total for the plantation.

Q. Yes. Now, what is that figure?

A. 34,653.17.

Q. All right. What does your black book show?

A. That's 1928; 34,650.17.

Q. That's identical? A. Yes.

Mr. Rathbun: What was that last figure, please?

(The reporter read the last answer)

The Witness: Seventeen.

Q. Now, Mr. Austin, does that show sugar produced from cane grown on fields under the control of the others? A. It does.

Q. And what is that figure? I am referring still to the 1928 annual report.

(Testimony of Stafford L. Austin.)

A. There is 161.90 plus—161.90 and plus 384.21.

Q. What owners was the cane purchased from from which this amount of refined sugar was manufactured? Does that show it?

A. It shows Sing Chong, McCandless and Pineapple Company [1331] cane.

Q. Can you state to the Court how this cane was grown, harvested, by whom, on these three ownerships?

A. The cane was harvested by the Honolulu Plantation Company and was—and the company helped in the cultivation and preparation of the cane during the growing period.

Q. All right, now, that same period, in that same period did you purchase any raw sugar as shown by the Plantation Company's annual report, 1928?

A. Three hundred seventy-five—

Q. No, you read from the report.

A. 375.72 tons of Waialua raws were purchased from the Waialua Sugar Company.

Q. All right, now. A. Outside raws.

Q. Now, what does your record show, your little black book that you have been reading from?

A. 375.72 tons.

Q. Does that check? A. That checks.

Q. Now, turning to the table 1 handed you, which is now Government's Exhibit 1—

The Court: For identification.

Mr. Vitousek: Does that have numbers or letters?

(Testimony of Stafford L. Austin.)

The Clerk: That's changed; we take the alphabet. [1332]

Q. Turn to the same year, 1928, now, what is the total of all sugar refined as shown on this exhibit?
A. 35,555.00.

Q. What is the total shown on the annual report I handed you, for 1928?
A. 35,555.00.

Q. For that same year what is the total shown on Government Exhibit 1 for identification of outside raw purchases?
A. 526.11.

Q. How would that—using the annual report can you tell what figures made that up?

A. They have taken the outside cane and added it into it to make the raw sugar purchases, and the raw sugar purchases should have been 375.72 tons instead of the 526.11.

Q. The total, the grand total?
A. Correct.

Q. But there have been various segregations of the outside cane and outside raws?

A. That's right.

Q. All right. (Showing some books to Mr. Rathbun)

Mr. Vitousek: What I was suggesting to counsel, if the Court please, is that rather than go through each one of these, since these are being introduced in evidence—he said he would prefer to look at them, which is natural—I'd like to state to the Court that I intended to offer them, introduce them in Mr. Spalding's testimony, and he was called to the coast in [1333] connection with this

(Testimony of Stafford L. Austin.)

plantation and he isn't here just at this time, and it would save an awful lot of time because we can take it up in argument if it is important.

Mr. Rathbun: I have no objection to marking them for identification, and let me look at them.

Mr. Vitousek: Very well. I'd like to have them all marked, 1924 down to and including 1943.

The Court: Annual reports of the company?

Mr. Vitousek: That's right.

Mr. Rathbun: From what year to what year?

Mr. Vitousek: 1924 to 1943 inclusive.

The Court: They may be marked for identification.

The Clerk: Honolulu Plantation Company Exhibit "A" for identification.

(The documents referred to were marked "Honolulu Plantation Company Exhibit A for identification.")

Mr. Rathbun: With the understanding, Judge, that this is for convenience, and I am not admitting anything on any grounds.

The Court: That's right.

Mr. Driver: Mr. Vitousek, would you mind telling us the purpose of the offer of that?

Mr. Vitousek: Well, are you familiar with this type of report? I might state to the Court that they are made up of two parts, one the manager's report, and the other is the [1334] financial statement taken from the books. The financial statement, I think, would be admissible on proper proof and

(Testimony of Stafford L. Austin.)

summation of the records of the books. But the purpose will be to make available for any witness to refer to who may be testifying, particularly now as to Mr. Austin, to show the manner in which the refined cane, refined sugar, was manufactured from plantation controlled land, from cane secured from other lands, and from raw sugar purchased, to substantiate the figures that he's given. It's quite obvious from his testimony that whoever made up these schedules—

The Court: You are getting in the same situation.

Mr. Vitousek: That's right.

The Court: "These schedules" meaning the Congressional claim, which is Government's Exhibit 1 for identification?

Mr. Vitousek: Yes. Mr. Austin testified to the totals shown on Government's Exhibit 1 for identification, and it corresponds with the totals shown in the report. I have one other question.

Q. Mr. Austin, the figures shown in your black book that you read to the Court, isn't that known as the manager's handbook? A. That is.

Q. Does that correspond to the figures shown in the annual report? A. It does. [1335]

By Mr. Driver:

Q. Did you get the figures from the **annual report**? Is that where you got the figures that are in your black book? A. Yes, sir.

Q. Well, it's not surprising that they correspond, is it?

(Testimony of Stafford L. Austin.)

A. I wouldn't think it would be surprising.

By Mr. Vitousek:

Q. I will ask one other question. In making up the report, it is not made up from the figures the manager compiles?

A. I beg your pardon? No, not made up of the figures that the manager compiles.

Q. Who compiles them?

A. The office manager.

Q. At the plantation? A. The plantation.

Q. Well, then, they come directly from the plantation? A. From the plantation.

Q. And where do your figures come from?

A. Directly from the plantation.

Q. So they are both from the same source?

A. That's right.

Mr. Vitousek: If the Court please, in order to go ahead in this matter, I would like the privilege of Mr. Austin being withdrawn until the Government has an opportunity to look over [1336] these reports, and we have another witness. We can go ahead with another witness at this time.

The Court: Very well. If he is recalled, it is only in connection with the annual reports?

Mr. Vitousek: That's right, in connection with the annual reports and possibly with the tonnage shown on this exhibit for identification of the Government, Exhibit 1.

The Court: Very well.

(Witness excused)

Mr. Vitousek: I'd like to call Mr. Schmutz.

GEORGE L. SCHMUTZ,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. Would you give your name in full, please?

A. George L. Schmutz; that's spelled S-c-h-m-u-t-z.

Q. Where is your home, Mr. Schmutz?

A. Los Angeles, in the North Hollywood section of Los Angeles.

Q. What is your occupation?

A. I am a licensed real estate broker and appraiser.

Q. How long have you been engaged in such occupation?

A. Continually since 1922, with my headquarters in Los Angeles.

Q. What has been your general experience in making appraisals?

A. I have had occasion to make appraisals in various parts of California, Texas, Louisiana, New York, Massachusetts, Michigan and in other states.

Q. And would you give us the names of some people by whom you have been employed? In making appraisals.

A. I have worked for several agencies of the United States, namely, the Navy Department, the Army Department, the Justice Department, the Defense Plants Corporation, the Reconstruction Finance Corporation, the Department of the Interior;

(Testimony of George L. Schmutz.)

and the Federal Home Loan Bank. I have also made appraisals for the State of California through its Department of Finance, Department of Public Works, and the Building and Loan Commissioner. I have also had occasion to make appraisals for various municipal corporations, some of which are the cities of Los Angeles, Beverly Hills, Glendale, Burbank, Long Beach, Culver City, Southgate, and others. I have also been employed by and have made appraisals for various corporations, some of which are the Standard Oil Company of California; the Southern California Edison Company; the Santa Fe Railway Company; California Bank, Title, Insurance and Trust Company; Hearst Magazines, Incorporated; Metropolitan Life Insurance Company; Los Angeles Turf Club; Will Rogers Trust; and others.

Q. Would you give the nature of your work in making some of these appraisals?

A. I have made appraisals, made an appraisal of the valuation of water rights and cattle ranches in and along the San Joaquin River in Central California, involving approximately a hundred thousand acres. This assignment was made for the Lands Division of the Department of Justice acting as attorneys for the United States Bureau of Reclamation. I made an appraisal of approximately ten thousand acres of sugar beet land and other crop land in the basin near Riverside, California, for the Orange County Flood Control District. I made an appraisal of approximately two hundred

(Testimony of George L. Schmutz.)

fifty thousand acres [1339] of water-bearing crop, rain and desert land in the Owens Valley, situated between the Yosemite National Park and Death Valley, for the Department of Water and Power of the City of Los Angeles. I made an evaluation of several thousand acres of sugar beet and lima beet land in Orange County for the Navy Department. I made an evaluation of some land of the American Sugar Beet Company near Chino, in Riverside and San Bernardino Counties. I made an appraisal of the Ford Motor Company assembly plant at Los Angeles Harbor. Also an appraisal of the Jones Brass Foundry in Los Angeles. Also of the enterprise of Gaffers and Sattler Stove Factory in Los Angeles. Also the Grosse-Ile Airport in the Detroit River. Also the Los Angeles Shipbuilding and Dry Dock Corporation plant and facilities at Los Angeles Harbor, for the Navy. Also the valuation of various industrial lands in Los Angeles, San Francisco, San Diego, and Hoboken, New York.

I organized the appraisal department for the Home Owners Loan Corporation in California in 1933, under appointment by the Federal Home Loan Bank Board of Washington.

Q. What previous experience did you have?

A. I was one time irrigation engineer for Miller and Lux, Incorporated, in the development of an irrigation project in the Central Valley of California. I was one time construction engineer for Imperial Water Company No. 3, in the Imperial Valley, California. I was one time city engineer

(Testimony of George L. Schmutz.)

of Douglas, [1340] Arizona. I was one time efficiency engineer at the Pilares Mine of the Phelps-Dodge Corporation in Mexico. I was one time the chief engineer of the Hilltop Metal and Mining Company in Arizona.

Q. Do you belong to any professional societies and associations? If so, give their names.

A. Yes, I am and for some years have been a member of the Los Angeles Realty Board and was chairman of its appraisal committee in the year 1937. I am also a member of the California Real Estate Association and was chairman of its appraisal division in 1934. I am also a member of the National Association of Real Estate Boards. I am also a member of the American Institute of Real Estate Appraisers. I was chairman of its education and research committee in 1938, president in 1940, and member of the governing council since.

Q. Have you given any courses or lectures in connection with the work of appraiser?

A. I have.

Q. Would you give them, please?

A. I have lectured on economics and valuation subjects at summer schools at various institutions, some of which are the University of Southern California, the University of Chicago, the University of Pennsylvania, the University of Pittsburgh, the University of Michigan, Yale University, Tulsa University, Denver University, Houston University, Toulane [1341] University, and Columbia University. Also I have lectured in short courses spon-

(Testimony of George L. Schmutz.)

sored by the following real estate boards: the Los Angeles Real Estate Board, San Diego Real Estate Board, San Francisco Real Estate Board, Portland, Oregon Real Estate Board, and the Honolulu Real Estate Board.

Q. Have you published any books or written any books in connection with appraisal work? If so, give the subjects.

A. Yes, I am the author of a book entitled "The Condemnation Appraiser's Handbook." Also another book entitled "The Appraisal Process." Also a pamphlet entitled "Interest Tables and Their Uses."

Mr. Vitousek: If the Court please, it's about time for recess and we will now start in on the main evidence, if the Court desires a recess at this time.

The Court: All right. We will take a brief recess of five minutes.

(A short recess was taken at 11:00 a.m.)

After Recess

By Mr. Vitousek:

Q. Mr. Schmutz, are you acquainted with the properties on the Island of Oahu of the Honolulu Plantation Company? A. I am.

Q. When did you first become acquainted with the Honolulu Plantation Company?

A. In December, 1940. [1342]

Q. When did you first see the properties?

A. That same month.

(Testimony of George L. Schmutz.)

Q. And have you made a study of the properties of the Honolulu Plantation Company?

A. I have.

Q. Have you made a study for the purpose of forming an opinion relative to the value of the properties involved in this particular case?

A. I have.

Q. You understand this is a consolidation of several cases? A. I do.

Q. And does your answer relate to the consolidated proceeding? A. It does.

Q. Without giving your opinion, have you arrived at such an opinion? A. I have.

Q. What did you take into consideration in forming your opinion?

A. Some of the matters which I took into consideration before forming an opinion—

Mr. Rathbun: Just a moment, please. I object to that question, what he took into consideration. There's no opinion been given yet, and the question doesn't enlighten us at all [1343] on what the opinion is about, what it covers.

Mr. Vitousek: Well, if the Court please, this is preliminary. Any of the authorities hold that first you have to show what consideration the witness took in consideration in arriving at the value of the property.

The Court: It is usual to do it the other way around, to have the witness state his opinion and then state his reasons.

Mr. Vitousek: Quite frequently they do it that

(Testimony of George L. Schmutz.)

way, but unfortunately — I mean there are fine authorities both ways, if the Court please.

The Court: He has formed an opinion apparently, for he states that after the study he made he has an opinion. But on what subject, I don't know. And I think that might be significant in connection with the things that he took into consideration. I don't think there is any hard and fast rule as to whether the reasons could be given first or secondly. So on that score I will overrule the objection.

Mr. Rathbun: I am not objecting to that score.

The Court: You are not?

Mr. Rathbun: No.

The Court: On the point of what these considerations will relate to, what sort of an opinion, I am in the dark, and I think the objection is good on that ground. Without perhaps being required at this time to give a figure, I would like to [1344] know the nature of the opinion. You can give it a temporary label for the moment perhaps to clarify it.

By Mr. Vitousek:

Q. Mr. Schmutz, have you arrived at an opinion, without giving the amount, of the properties of the Honolulu Plantation necessary for the operation of that plantation enterprise, excluding movable personal property, excluding growing crops, which opinion is of the value of the property before and after the takings involved in this suit?

A. I have.

(Testimony of George L. Schmutz.)

Q. State to the Court the consideration of the matters, facts and things you took into consideration in arriving at it?

Mr. Rathbun: Just a minute.

Mr. Vitousek: I'd like to withdraw that question and reframe it.

The Court: The question is withdrawn.

Q. Will you give the consideration, your considerations in arriving at that figure?

Mr. Rathbun: If your Honor please, we object to the question stated. If he means to do it, he has limited the opinion to the property of the Honolulu Plantation Company necessary for the operation of the plantation enterprise; if they are limiting it to that, O.K., but I believe he means the whole property regardless of whether it is necessary or whether [1345] it isn't. We ought to have an understanding on that. It might cover a multitude of sins, and there may be a great difference of opinion as to what is necessary.

The Court: Is it the same type of thing that you put to Mr. Austin?

Mr. Vitousek: Yes, if the Court please.

The Court: Same identical question?

Mr. Vitousek: Yes. In order that there be no question on it, I will withdraw both questions and may they be stricken.

The Court: All right.

Q. Mr. Schmutz, have you arrived at an opinion as to the value, both before and after the takings involved in the consolidated proceedings now on

(Testimony of George L. Schmutz.)

trial of all of the property of the Honolulu Plantation Company that formed the sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops?

A. I have.

Q. In arriving at that opinion what did you take into consideration?

A. My general considerations were these, that prior to the time of the takings and for some years prior to that, the Honolulu Plantation Company was an integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productive activity, grew sugar cane which it [1346] processed into raw sugar, which was further processed into refined sugar.

The Court: Just a minute. Are you reading something?

The Witness: I am using some notes to refresh my memory, your Honor.

The Court: All right. Go a little bit slower with all those large words. We are making notes on this. Will you go over that again?

The Witness: Yes, sir.

A. (Continuing): That for some years prior to the taking the Honolulu Plantation Company was an integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productive activity. It grew sugar cane which it processed into raw sugar, and which was further processed into refined sugar. I took into con-

(Testimony of George L. Schmutz.)

sideration the amount of dividends which had been distributed to its shareholders, going back to 1908, and with a special reference back to the year 1924. I took into consideration the fact that in 1936 the company renewed or extended most of its major leases to the year 1965, and in one light became a new enterprise. I took into consideration the amount of money which this company spent in additional capital improvement and betterments in the three years immediately following the renewal of the leases. I also took into consideration the fact that in June of 1939 there commenced a series of takings in which cane lands were [1347] lost to the United States and to others, and that such losses continued up to the time of the first taking involved in this consolidated action, and including the lands lost which are involved in this action. I also took into consideration that following the first takings in 1939 the company was able to make their replacements of cane-growing areas at higher elevations. Those generally are the—I also took into consideration the book value of the company at various times, in addition to the fact that these book values were set up at cost as of 1932. I also took into consideration the earnings of the property during the years prior to the takings. These, briefly, are some of the matters which I took into consideration before forming my opinion of value.

Q. Did you visit the plantation properties?

A. I did.

Q. More than once?

(Testimony of George L. Schmutz.)

A. The first time I visited the property was in December, 1940. The last time I visited the property was in November, 1946. I did not visit the property in between.

Q. On or about June 20, 21, 1944—I'll withdraw that question. Did you make any investigations to find out if the plantation properties about which you are to testify, about which you formed the value, were being sold in the Territory of Hawaii? A. I did make an investigation. [1348]

Q. What was the result?

A. The result was, I was unable to learn of any sales of plantations.

Q. During the year 1944, your investigations relate to the year 1944 in connection with sales?

A. And prior.

Q. What was the situation of this Territory in the year 1944? A. We were still at war.

Q. Now, Mr. Schmutz, what was the fair value, as of June 21, 1944, that is, immediately prior to the filing of the first suit in these consolidated actions, of all of the properties of the Honolulu Plantation Company that formed that sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops?

Mr. Driver: Objected to.

Mr. Rathbun: We object, if your Honor please, for the reason that the questions show, and the answers of the witness show, that in arriving at

(Testimony of George L. Schmutz.)

the value as of June 21, 1944, he has taken into consideration productive activity of this perpetuated synchronization of the agricultural enterprise; he has taken into consideration the dividends that have been distributed to the shareholders; he has taken into consideration earnings on the property; he has taken into consideration [1349] lands taken previous to the lands involved in this proceeding, namely, in 1939. Those are not involved here. But he still considered them in his opinion. For those reasons, also the book value he has taken into consideration as of the date previous to these last takings. For those reasons we object. And also the usual situation that he should state that whatever opinion he has, having the leases in mind and that there were strikes and conditions.

Mr. Vitousek: Are those the only reasons for the objection?

Mr. Rathbun: Those are the reasons I stated.

Mr. Driver: They are enough.

Mr. Vitousek: If the Court please, those are reasons that may go to the weight of the witness' testimony, but since those reasons are technical rather than the main point what I felt was at issue, I'd like to withdraw that question and question the witness further on these points.

The Court: Very well.

By Mr. Vitousek:

Q. Mr. Schmutz, you have been in court during the trial of these proceedings, have you not?

A. I have.

(Testimony of George L. Schmutz.)

Q. And you saw introduced in evidence a series of leases? A. I did.

Q. Leases executed by various owners to the plantation, [1350] of land used by it?

A. I have seen them.

Q. Have you examined them?

A. I have.

Q. And you said you have taken into consideration, you stated that you had considered that the company renewed or extended its leases?

A. I did.

Q. Were the leases you referred to were the ones you said you examined? A. Yes, sir.

Q. Now, what considerations, if any, were given to the so-called book value?

A. It was just one of the many matters which an appraiser, which I as an appraiser took into consideration before forming my opinion.

Q. What do book values represent in a case of the Honolulu Plantation Company?

A. They represent the amounts that were, the amounts at which the items are carried on the books, based upon the cost as set up in 1932, less depreciations accrued year by year, plus additions to capital in the meantime.

Q. Now, you stated you took into consideration the takings of plantation lands or the right of the plantation to use land prior to the takings involved in this suit. What [1351] consideration did you give to that?

A. That was one of the matters which I took

(Testimony of George L. Schmutz.)

into consideration before forming an opinion as to the probable value of the property after those takings and immediately prior to the time of the first taking in this action, or we'll say June 21, 1944. As a matter of fact, before forming an opinion of the value of the property as of any date, I am interested in knowing something of the history which went on before.

Q. Well, in giving this value, is there included in any way a loss that might have been suffered by the plantation, if any, in the prior cases?

A. There is not.

Q. What consideration did you give to the fact that land had been, that area had been replaced from time to time by taking other land into cultivation, areas that had previously been taken?

A. The replacement of land previously lost tends to reestablish the company in the position in which it previously had been, because of the replacement of those lands. The extent of the weight given to the consideration, I am unable to say. I will say this, however, that my opinion of value is not predicated upon any one set of figures or conditions, but it is taking into consideration all of the matters which I believe to be pertinent as affecting the value of the property. [1352]

Q. Did you understand that you were valuing property or rights to property and not the company as a whole?

A. Yes. By that I suppose you mean that I am not valuing the real estate for the reason that real

(Testimony of George L. Schmutz.)

estate can't have value. But what we do when we make an appraisal is to value the rights of use of the real estate. In other words, we value the rights rather than the things to which the rights are attached.

Q. Well, what I had reference to was, you were not attempting to value stock or value the plantation company as a whole but rather the properties involved in these takings?

A. The real estate, irrespective of ownership.

Mr. Vitousek: Now, if the Court please, we renew the question.

Mr. Rathbun: We renew our objection, on the same grounds.

Mr. Vitousek: If the Court please, this falls into the same type of question as was given before, and considerations are those considerations which one would naturally give, as shown by the decisions. First, the fact that it had been a profitable enterprise prior to the takings, not that you took into consideration and capitalized the profit but that it had been successful. Certainly that is something to consider in valuing properties. The fact that the size of the plantation is affected by the prior takings relates to history, and it is the same type of evidence as given by Mr. Austin. In other [1353] words, we could not claim in this case, nor are we attempting to claim in this case, depreciation, if any there occurred or pretending there was, due to the properties, due to the takings not involved in this case. Therefore, a person in studying the history of the plantation, the fact that the original had a 30, or I believe up to a 35 ton producing mill,

(Testimony of George L. Schmutz.)

after those takings involved in the prior cases it went down to a 21 thousand ton producing plantation, that is, from canes grown and controlled by it, is a matter of history. In order to value it as of the time in 21 and down to 15, naturally those matters are considered as to whether they entered into the valuation in the matter of dollars and cents in making a computation. The witness has said he did not consider them as history; those are all matters that anyone trying to value the plantation, in this particular instance shown that in 1944 there was no market—it's almost a matter that the Court could take judicial knowledge of. The United States was at war and Hawaii in the center of it. So it is necessary to get to a fair value. All those various factors are all factors that courts have said before are matters to be considered. But what is distinguishable and what we are not trying to claim here in any sense is the so-called loss of business. What we are doing is to confine this to property.

Now, as shown in the General Motors case, there is a difference between possibly property and — between property [1354] in the ordinary sense and a right to use property. But it was held that that was a property that should be considered in a condemnation case where a leasehold was directly involved. And here leaseholds are directly involved. All those matters are matters in which anyone appraising a property, to arrive at the value of the property must take into consideration. They cannot say that they made so much money, therefore we

(Testimony of George L. Schmutz.)

will capitalize that at a certain rate, and that's the value. No, that's what the courts say cannot be done. But that it is successful or has been successful in the history of the past, certainly anyone going out there to purchase it—and that's what we must put ourselves in the frame of mind, of an alleged purchaser for cash, if we are taking into consideration market value. And certainly if we are taking the fair value, those are the same matters you would consider, would want to know, whether the enterprise in the past had been successful. Now, when it comes to what he pays for it, that's up to capital investment at that time. But as to what the owner placed his original cost less depreciation, it is also something to be considered. And that is the so-called book value which was established, he says, as of 1932. That's what the owner sets up as a value at that time, and since then depreciated, or how they arrived at it we don't know. But that is something a purchaser would consider also as to the weight any one of these items were given. I submit that is a matter for further [1355] questioning or cross-examination. But they are all proper matters to have in mind, and that's all it amounts to for a person to have in mind when they are placing a fair value on property.

The Court: I am going to overrule the objection. You may have an exception to this and the line. (To the witness) Do you wish the question read to you?

The Witness: Yes, I wish it would be read, please.

(Testimony of George L. Schmutz.)

(The reporter read the question referred to)

A. My answer is \$4,200,000.

Q. Mr. Schmutz, I will ask you if your opinion of the fair value of the same properties with the same exclusions after the takings involved in these proceedings—

Mr. Driver: Objected to.

Mr. Rathbun: On the same grounds.

Mr. Vitousek: Just a minute, if the Court please. I'd like to reframe that.

Mr. Rathbun: Again, to avoid constant repetitions, may we have our objection on this question of value all the way through?

The Court: He says he is going to reframe the question, so I think you had better wait a minute.

Q. Mr. Schmutz, I will ask you the same question as to fair value, the same property and with the same exclusions, after the takings involved in these proceedings, and assuming [1356] the takings were after the date I gave you, June 21, 1944?

Mr. Rathbun: We object upon the grounds that we objected to the other question.

The Court: Same ruling and a continuing exception to the line.

Mr. Driver: And now, with the Court's permission, may I give one further reason for the objection, and that is, that the witness has apparently included in his opinion value of testimony something for this integrated business enterprise that he speaks of?

The Court: That may be noted, and the ruling

(Testimony of George L. Schmutz.)

is the same and the exceptions relate to that point as well and continue.

A. The answer is \$3,113,000.

Q. Mr. Schmutz, in arriving at these opinions of value, will you state whether or not you included any value of profit or good will of a going concern? A. I did not.

Q. What was the total irrigated cane land area controlled by the Honolulu Plantation before the takings involved in these particular consolidated actions now on trial?

A. Four thousand two hundred eighty-three acres.

Q. And after the takings involved in these consolidated actions?

A. Three thousand one hundred ninety-six acres. That is irrigated cane land. There is an additional 114 acres in [1357] cane but it was dry farmed.

Q. Now, Mr. Schmutz, in connection with the answer you gave after the takings, I want to make an assumption and ask for your opinion. Assuming that instead of being the 1,087.59 acres taken, there was only 750 acres taken. In that event, what would be your opinion as to value of the properties described in my main question, with the exclusions that I referred to?

A. Three million four hundred fifty thousand dollars.

Q. How did you arrive at that?

A. Briefly a thousand dollars an acre.

Q. And that thousand applied to what character of land? A. Irrigated cane land.

(Testimony of George L. Schmutz.)

Q. Would you explain how you arrived at that figure of a thousand dollars an acre?

A. I took into consideration several matters. One of them was the evidence that I found in discussing the matter with people as regards to the common notion in the community regarding the investment in irrigated cane lands per acre, which was a thousand dollars an acre for plantations which did not have a refinery, whereas this particular property does. I also made a study indicating the amount of depreciation in the value of the property from 1939 on up until the present time, for the purpose of getting an over-all picture on shrinkage in the value occasioned by the taking of considerably more acres [1358] than are involved in this action, for the purpose of arriving at an indication of the amount of depreciation on the average which was suffered by reason of the loss of each acre, on the average. I also had occasion to make a study of a report prepared by a technician in this city of the damage caused by 580 acres of land taken in this particular plantation in some prior actions for the purpose of getting his views, his method of approach, and his conclusions. And as a consequence of these studies and investigations and computations, I came to the conclusion that the average value is about a thousand dollars per acre; for each acre that was lost, shrunk the value of the property, the physical property, at the rate of about a thousand dollars per acre.

Q. Well, would it be true the reverse, to add land, cane land, to the plantation?

(Testimony of George L. Schmutz.)

A. In a measure, yes, provided that the additional capital investment was made in additional water facilities, in additional ditches and canal to get water on to the land for irrigation, in addition to the milling facilities and the refining facilities to take care of the increased capacity from the increased cane land, and provided additional capital investments were made in housing for employees. I believe it would work both ways.

Q. You heard the testimony of Mr. Austin regarding the capacity of the mill, refinery, the mill and refinery, did you [1359] not? A. Yes, sir.

Q. Did you also make any check of the records regarding the output of the mill?

A. Yes, I had copies of the published annual reports of the company.

Q. As of the date of these takings the cane produced on the plantation would permit, that is, before the takings, as of the date but before the takings, permit what output of the mill?

A. As I recall, it was approximately 20,000 tons.

Q. And after the takings?

A. Approximately 15,000 tons.

Q. Would the fact as shown by such testimony and as shown by such evidence have anything to do with the value of the mill? If so, what?

A. In my opinion it would tend to depreciate the value of the mill because of the resulting overcapacity, and because of the further fact that there would be an increase in production costs, all of which would tend to put the mill in the position

(Testimony of George L. Schmutz.)

of being unable to earn a fair return upon its reasonable value.

Q. What is meant by capital investment?

A. Capital investment means the money invested in an [1360] enterprise.

Q. Well, assuming that a willing purchaser would have purchased this property after the takings for a figure you stated, as your opinion of value, \$3,113,000, had paid that, now, what would be the capital investment there?

A. Well, there are two capital investments. From the standpoint of the purchaser, the amount which he pays for a property is his capital investment, and at the same time it is entirely possible that the company which owns the property being sold may have a greater or even a lesser capital investment in the property.

Q. Well, does capital investment mean value?

A. No, it does not. Capital investment refers to cost in contradistinction to value.

Q. Value may be more or may be less?

A. That is true.

Q. You heard the testimony of Mr. Austin here in this case as of 1944 and that no lands were available to increase the cane area for this plantation?

A. I did.

Q. Did you give that any consideration?

A. I did.

Q. How?

A. If there had been land available for replacement of the cane-growing areas, in my opinion the damage would have [1361] been less.

(Testimony of George L. Schmutz.)

Q. You heard his testimony regarding the purchase of raws? A. I did.

Q. Does that enter into your reasons at all for this value? If so, how?

A. Yes, if there would have been a free market for raws and raws could be purchased in the market to take the place of the plantation-grown raws, in my opinion the damage would have been less.

Q. Mr. Schmutz, Mr. Austin testified that you assisted in the preparation of a claim before Congress. A. That is correct.

Q. Will you please tell this Court whether or not the claim for damages was included in that claim for the takings involved in what we term the first Hickam Field taking, which was Civil Case No. 289 in the Court's records here, filed June 2, 1935, judgment February 25, 1935?

Mr. Rathbun: I object to that. The claim speaks for itself. It is not for him to say what was in it.

Mr. Vitousek: The claim has not been before the Court and counsel read from the claim and asked Mr. Austin is it not true it was included in there, and reading from the claim itself, but didn't put it in evidence.

Mr. Rathbun: It was a very proper time to get it in there [1362] and have it identified.

Mr. Vitousek: It's identified—

Mr. Rathbun: One page only.

The Court: Well, it still remains true, doesn't it, that the claim speaks for itself? What you might think of it and what someone else might think of

(Testimony of George L. Schmutz.)

it is not as important as what the claim itself says.

Mr. Vitousek: Well, that is possibly true, if the Court please, but the man who prepared the claim can state whether or not this was included. I think it is a proper question.

The Court: I think the claim speaks for itself.

Mr. Vitousek: May we submit to the Court's ruling?

The Court: The objection is good, and you may have an exception.

Mr. Vitousek: Exception. This about concludes this, and it's about time for recess, and I would like to check.

The Court: All right, we'll take a brief recess.

(A short recess was taken at 12:00 noon.)

After Recess

The Court: Any further direct?

Mr. Vitousek: That's all of direct at this time.

The Court: Cross-examination?

Mr. Rathbun: We move, if your Honor please, to strike the testimony of the witness, upon the grounds stated in the objection to the two value questions. [1363]

The Court: Same ruling, same exception.

Cross Examination

By Mr. Rathbun:

Q. Mr. Schmutz, you pretty largely since 1922 have been confining yourself to making appraisals for people that paid you a fee, and testifying in court, haven't you?

A. That is true, particularly since 1928.

(Testimony of George L. Schmutz.)

Q. Yes. You were hired by the Honolulu Plantation Company in connection with something or other back in 1940?

A. I was not employed by them in 1940. I looked over the property and discussed the matter of pending actions with Mr. Phil Spalding, the president of the company. It was not until the spring or summer of 1944 when I was first employed.

Q. Did you come here to Honolulu to talk that over with Mr. Spalding? A. In 1944?

Q. In 1940.

A. No, I did not come here for that purpose.

Q. Where did you see Mr. Spalding?

A. I had lunch with Mr. Spalding at the Young Hotel

Q. Where? A. In Honolulu.

Q. You came here, then?

A. I did. I was here.

Q. You were here? [1364]

A. Yes, I was here.

Q. For that purpose?

A. Not for that purpose.

Q. And is that all you had to do with it from 1940 until 1944? A. That's right.

Q. Gave it no further thought?

A. That is true.

Q. Then what was the occasion of your connection with it in 1944?

A. For the purpose of making an appraisal to be included in the report to be submitted to Congress.

(Testimony of George L. Schmutz.)

Q. And in this proposed claim to Congress was this document that I now show you filed with the Congress of the United States? (Handing witness a paper-bound book)

A. I do not know whether it was filed or not.

Q. You collaborated in the making of that particular document, did you not?

A. I did. I prepared the section called "The Appraisal."

Q. And used the exhibits referred to in your so-called appraisal in there which are attached?

A. That is true.

Q. You don't know whether it was filed or not?

A. I do not.

Q. You made it up, whatever you did, for the purpose of [1365] having it filed?

A. That is correct.

Q. And you meant that the representations contained in there should be considered by the committee of Congress that this was submitted to, didn't you? A. Say that again, please.

(The reporter read the last question.)

A. That is correct.

Q. So whether it was filed or not, that was your purpose in making these representations, wasn't it?

A. That is correct.

Q. You assumed it would be filed, did you not?

A. I understood that it was to be filed or to be presented.

Q. How long did you work on the preparation of that document, consultations, and so forth?

(Testimony of George L. Schmutz.)

A. Offhand I would say four to five weeks in San Francisco in the office of Honolulu Plantation Company.

Q. Four or five weeks? Was that daily, continually?

A. Yes; there were a few lapses in between when I went back to Los Angeles. But when I went to San Francisco, it was usually from one to two weeks at a time. So I would say that the total time would be probably four to five weeks.

Q. And in testifying in these cases like this one, where you are employed by people to give an opinion, do you [1366] have any rate that you charge per day or per hour or a week or what?

A. I have.

Q. What is your rate?

A. One hundred dollars per day and expenses.

Q. What did you charge the Honolulu Plantation Company for your services at this time that you had completed this claim that was gotten up for the purpose of filing it in Congress?

A. My fee was exactly the same throughout the entire work that I have done for Honolulu Plantation Company, on a per diem, one hundred dollars per day plus expenses.

Q. What has been your total fee up to the time that you took the witness stand here in this case?

A. I haven't the slightest idea.

Q. Can you estimate it for us?

A. It would be four to five weeks in the preparation of that, and I have been here since the morning of the 19th of November.

(Testimony of George L. Schmutz.)

Q. I said up to the time that you got here. That would be about how many days altogether that you put in there up to the time that you came here? A. Twenty to twenty-five days.

Q. So that your fee up to the time that you came here to the Honolulu Plantation Company was not exceeding twenty-five [1367] hundred dollars? A. I think that is right.

Q. That's all the remuneration that you had?

A. Plus expenses, of course.

Q. Plus expenses, travelling to Honolulu and back?

A. No, travel from Los Angeles to San Francisco and hotel bills in San Francisco.

Q. O.K. How much have you been paid on account of expenses?

A. I do not recall whatever they were.

Q. And what do you expect to charge for the time that you have been here?

A. At the same rate that I have just mentioned.

Q. Do you have further employment in mind in connection with this matter?

A. I have none.

Q. You haven't been advised or retained in any way in case any further proceedings are taken before the Congress of the United States?

A. That has not been discussed.

Q. Now, you say in connection with this opinion that you are testifying to here, on a before and after basis, that you considered the fact that this synchronized agricultural enterprise was a productive activity. What did you mean by that? [1368]

(Testimony of George L. Schmutz.)

A. I meant that it is an enterprise in which there is production.

Q. Just a matter of production of sugar, is that it?

A. That is correct.

Q. And you also said that you considered the dividends distributed to the shareholders back as far as 1908, and especially up to the year 1924?

A. Not specially; since 1924.

Q. Since 1924?

A. Yes, sir.

Q. Well, was there any—why did you pick out 1924?

A. As I recall, that was because that was about 16 years prior to 1939, and the life of the leases have about 26 years yet to go. I was making a study of the indicated value based upon earnings of the 16 years prior to the time of what might be called the last normal operations before the war.

Q. Now, in considering the dividends distributed to the holders of the stock from 1908 on, what is your purpose in considering those?

A. For the purpose of getting the general idea as to whether there had been any regularity of the dividends and whether the property was considered a successful company.

Q. In other words, entering into the value that you gave was a consideration of the fact which you put on the credit side in your valuation that they had paid dividends [1369] that you considered ample, is that right?

A. I took into consideration the fact that they had paid dividends without giving it—that is a

(Testimony of George L. Schmutz)

qualitative statement without reference to quantity.

Mr. Vitousek: The witness should be permitted to finish his answer.

Mr. Rathbun: Were you through, Mr. Schmutz, with your answer?

The Witness: Yes, I think so.

A. To be sure that we understand each other, I did take into consideration for the purpose of forming a judgment whether it had been a successful enterprise.

Q. But you did take it into consideration in arriving at your opinion?

A. For whatever it was worth, I did.

Q. Yes. Supposing the report of the earnings that you took into consideration had shown a loss instead of earnings, would that have made any difference in your opinion of value?

A. Are you talking about dividends or what?

Q. Dividends, dividends.

A. I don't know how a dividend could be shown as a loss.

Q. Well, I probably confused the question. If it is shown that instead of paying dividends that they had lost money and then earned dividends, would that have made any difference in your opinion of value? [1370]

A. It would.

Q. You would have given it considerably less value, wouldn't you?

A. That is true.

Q. Would the fact that for several of the closely previous years to 1944 that they didn't earn sufficient money to pay any dividends to the stockholders have had any effect upon your opinion?

(Testimony of George L. Schmutz.)

A. I took that into consideration. There were two years to which you refer.

Q. You took that into consideration?

A. I did, sir.

Q. You didn't say that in answer to counsel's question, did you? You said you took into consideration the earnings only and the dividends paid.

A. And I also stated that I took in the net income available for interest on the investment before depreciation and after the payment of Federal and Territorial income taxes.

Q. What years was it that they had this shortage that you just mentioned?

A. 1939 and '40 were two years in which dividends were not paid.

Q. Do you know what the statement showed that year as to profit and losses?

A. Yes, I do.

Q. What did it show?

A. Before telling you this, I will have to tell you what—at the bottom of the statement there is shown the annual report, the amount.

Q. Please answer my question, if you can.

A. Well, I can't answer your question unless I tell you what I am going to tell you about.

Q. I asked a question. That's all I want.

A. It can't be answered.

Q. It can't be answered?

A. No, sir.

Q. You cannot answer that question?

A. I cannot answer that question without giving you an explanation of what the statement does actually show.

(Testimony of George L. Schmutz.)

Q. All right. That answers my question. You can't answer it. Do you know that in the year 1938 they showed a net loss of \$334,265.93?

A. That is not correct. These figures are in error. That's what I was trying to tell you.

Q. What figures are in error? We are using the word "these" again.

A. Every figure in this column on table number one, shown as net income available for interest on the investment—

Q. Yes?

A. —the annual reports are here and I can show them to [1372] you if you want to get the correct figures.

Q. Well, I'm going by this table number one, which has been—

A. Table number one is in error in that column.

Q. Identified as Government's Exhibit No. 1. This is the exhibit that you attached to your part of the claim that was submitted to Congress as an exhibit and referred to it, didn't you?

A. That is correct.

Q. And it was meant to be represented to the Congress as the true statement of the situation?

A. That is correct.

Q. In the year 1939 did they have a net loss of \$197,559.11? A. They did not.

Q. That is incorrect also?

A. That's right.

Q. And what you said about the other item would apply to that? Your answers would be the same, would they?

(Testimony of George L. Schmutz.)

A. That's true for every figure in that column.

Q. Now, had there been a loss of \$334,265 in 1938 and \$197,559 in 1939, how much, if any, difference would it have made in the valuation that you have given here?

A. I am not prepared to give you any such figures.

Q. Can you figure it out? [1373]

A. No.

Q. You can't do that? A. No.

Q. Possibly? A. No.

Q. It was also represented to Congress through this table one, was it not, that in the year 1940 they had net income of \$175,334.81 available for interest on the investment? Another way of saying dividends, isn't it?

A. No, it isn't another way of saying dividends, but that is the figure in this table.

Q. All right. And no dividend was paid, was there? A. That is correct.

Q. Did you consider the fact that the reason it wasn't paid was because they had paid, they had had those losses in the previous few years and had to make them up?

Mr. Vitousek: If the Court please, I object to that question. What does he refer to? There has been no testimony in regard to losses.

The Court: Referring to losses reflected in table one of the Congressional claim for the years 1938 and '39.

Mr. Rathbun: That's what I am referring to in this table.

(Testimony of George L. Schmutz.)

Mr. Vitousek: Which the witness says is incorrect.

Mr. Rathbun: We'll go by this first and we'll find out about the incorrect part. [1374]

The Court: I think the question is clear. Do you have the question?

The Witness: May I have it?

(The reporter read the last question.)

A. No, I didn't know that those were the facts.

Q. You didn't know that what was the fact?

A. What you just stated, that they had the losses in the previous years and they were trying to make them up.

Q. You knew that table number one showed it as you filed it with Congress, as you prepared it?

A. Yes, sir, it was prepared in the office of the Honolulu Plantation Company in San Francisco through an error in instructions.

Q. Then you did know about it, didn't you?

A. I learned about it later.

Q. Didn't you learn about it when this was prepared for this claim?

A. No, sir, it was not until later after that that we discovered the difference.

Q. But you knew it was on this claim as I read it to you?

A. It was as it went in, but I didn't know whether it was right.

Q. You knew it was on this table, didn't you?

A. Yes, sir. [1375]

Q. **And you meant to have that filed in Con-**

(Testimony of George L. Schmutz.)

gress? A. Yes, sir.

Q. In the year 1941 they show net income available for interest on the investment of \$187,140.46 and paid a dividend of one hundred fifty thousand. You knew that, did you? A. I did.

Q. In 1942, two years before these takings in these cases, they had earnings, net income rather, available for interest on the investment of \$28,005.44. You knew that was on this table, did you?

A. Yes, and they paid dividends of one hundred fifty thousand that year.

Q. Well, now, I'll ask that. Did I ask you that?

A. No, I'm sorry.

Q. Will you please wait until I ask you a question and answer my question. They paid a dividend of \$150,000 that year, did they not?

A. That is correct.

Q. That had to come out of surplus, did it?

A. That's right. No, it didn't have to come out of surplus. According to this it did. But these weren't the facts.

Q. All right. The table one shows it would have had to come out of surplus?

A. That is correct if table one were correct.

Q. In the year 1943 they earned \$186,969.88 and paid a dividend of one hundred fifty thousand?

A. That is correct.

Q. And that was on this table, wasn't it?

A. That is correct.

Q. Now, assuming that the net income available for interest on the investment, beginning with the

(Testimony of George L. Schmutz.)

year 1938 down through and including the year 1943 was truly as I have read the figures to you appearing on table one, would that have affected your value or your valuation, your opinion of value that you have testified to in this case?

A. Yes, it would have been less.

Q. To what extent? A. I cannot tell you.

Q. You can't figure?

A. Well, I wouldn't rest my opinion upon any such computation anyway, Mr. Rathbun.

Q. You can't figure by figuring out in dollars and cents how much less it would make your opinion?

A. No, sir, not based upon this alone because I don't predicate my opinion—

Q. Well that's my question. Please. On the bottom of that table one, Government's Exhibit one for identification, under the word "averages", for 37 years the annual average net income available for interest on the investment was [1377] \$457,030.93. And the dividend paid annually averaged \$380,608.11. Is that correct as set forth on that table one? A. It is.

Q. From the year 1924 to the year 1939, a 16-year period, the average net income available for interest on the investment was \$312,433.65, and the annual amount paid in dividends over that 16-year period averaged was \$406,718.75. Is that correct? A. Yes, sir.

Q. Now, on the face of those figures, as to 1924 to 1939, it shows that they paid more dividends

(Testimony of George L. Schmutz.)

than they had earnings available for it, doesn't it?

A. That is correct.

Q. Now, that's what you call a successful company, is it, financially? A. It is.

Q. Now, you considered that in 1936 some leases were renewed or extended, most of them to the year 1965, is that what you said? A. Yes, sir.

Q. In arriving at your opinion of value in this case, you considered leases having been renewed previous to the leases which are involved in these takings here, is that right. A. That is right.

Q. Did you study the Honolulu Plantation lease which is [1370] in evidence here as Exhibit 9-K?

A. I read all of the leases but I don't recall that particular one.

Mr. Rathbun: All right. (To the Clerk) May I have that one?

The Clerk: That's the Damon Estate? Do you want Bishop or Damon?

Mr. Rathbun: No, Damon.

Q. Is that the lease that you studied, or have you studied it? (Handing document in evidence to the witness.) Exhibit 9-G.

A. I'm quite sure that I read this lease.

Q. Well, you should have read it in view of your testimony, shouldn't you?

A. No, not necessarily.

Q. Didn't you consider these leases?

A. I did consider the leases; and counsel told me, on the instruction of counsel I assumed that they had a lease. I'm not a lawyer and can't pass upon the validity of title.

(Testimony of George L. Schmutz.)

Q. All right, you assumed after you examined this lease, then, and based your opinion upon the information that you obtained, that that lease, which on its face expired on the 30th day of December, '43, I think—expired 15 years from the first day of January, 1929—you knew that, didn't you?

A. Yes, sir. But there were other documents in connection [1379] with that which I am informed formed a contract, an enforceable contract, by which the terms could be extended.

Q. And you accepted that statement?

A. I did.

Q. Assume that the advice that you had was incorrect, and that there was no renewal of that lease, that would have had an effect upon the opinion that you have given in this case, would it not?

A. It would have.

Q. Would it affect it downward or upward?

A. Downward.

Q. Can you figure out how much less than what you have testified to you would have given on that account?

A. At the rate of a thousand dollars an acre for each acre involved in that lease.

Q. And how many acres are involved in that lease? A. I don't recall.

Q. Will you take this lease and tell me the acreage that you have in mind when you say you would decrease it at the rate of a thousand dollars an acre?

(Testimony of George L. Schmutz.)

A. Well, I would expect counsel to tell me the number of acres involved.

Q. I don't know what you'd expect counsel to tell. I want you to do it, please. (Handing document in evidence to the witness.) [1380]

Mr. Rathbun: When he gets through with that, I can't possibly finish today. Can we quit at that point?

Mr. Vitousek: I want to register an objection. This counsel is calling for this witness to answer a conclusion of law, what this lease covered in acreage. The exhibit in this case would show, if he wants to get the acreage.

The Court: I don't think the acreage itself is a matter of law. It is a matter of mathematical computation. The witness may answer the question, if he can. You may have an exception. May we have the question?

(The reporter read the last question.)

Mr. Vitousek: We submit the witness has testified regarding cane acreage, and it's been shown that the long lease involves other takings a long period back. We submit that the question can't be answered from that lease. It is a matter of law. That's the point we are making.

Mr. Rathbun: Any question of law to it, if your Honor please? This man considered that lease, he says. I want to know what he considered and how much and to what extent.

The Court: The witness may answer the question if he can.

(Testimony of George L. Schmutz.)

A. According to the lease there appears to be 1,451.66 acres involved. But of that I don't know how many were cane acres.

Q. Did you try to find out when you considered that [1381] lease for the purposes that you stated?

A. That information was furnished me by the Lands Department of C. Brewer and Company as to the number of acres involved; and as regards the status, the legal status of the lease, that information was furnished me by counsel.

Q. All right, then, how much would you take off, then, from your valuation because of the assumption that I put in my other questions?

A. Well, if all of these 14—well, I'd take off a thousand dollars per acre for each acre of cane land, whatever it was.

Q. Well, that would be over a million dollars, wouldn't it?

A. Assuming that those were all cane acres, and I am positive they weren't.

Q. Well, what percentage of them, if you are positive, there wasn't?

A. Well, I can't give you the figure now. I'll have to dig it out. It's in the evidence here, I'm sure.

Q. Never mind the evidence. I'm asking you.

A. I don't know.

Q. I'm testing your knowledge.

A. I don't know.

Mr. Rathbun: All right. May we stop there, Judge?

The Court: Yes, we'll adjourn at this time for the day, resuming tomorrow morning at 9:00 o'clock.

(The Court adjourned at 12:50 p.m.) [1382]

Honolulu, T. H, December 11, 1946

The Clerk: Civil 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready, if your Honor please.

Mr. Rathbun: Ready.

The Court: You may proceed.

GEORGE L. SCHMUTZ,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Cross-Examination—(Continued)

By Mr. Rathbun:

Q. Mr. Schmutz, is that the way you pronounce your name? A. Yes, sir.

The Court: You are mindful of the fact that you are still under oath?

The Witness: Yes, sir.

The Court: You may proceed with the cross-examination.

Mr. Rathbun: Mr. Vitousek handed me last night the annual reports of the Honolulu Planta-

(Testimony of George L. Schmutz.)

tion Company, from 1924 to 1943 inclusive. We have examined them hastily last night and we object to—will your Honor look at one that is typical?—the [1383] printed matter in the beginning, which is a resume of what some officer, manager and vice-president, or some other person thinks about what the report shows, the report of the stockholders. That report we object to. As far as the figures are concerned, we have no objection. (Handing a small book to the Court.)

Mr. Vitousek: The Court will recall yesterday I stated that the printed matter I doubt if it will be evidence. The figures are taken, summaries from the books, and would be.

Mr. Rathbun: Well, just for the record I am making that objection. I am not insinuating that your Honor will be persuaded by reading it, but it should be in the record.

The Court: So as to all of these offered annual reports the only admissible parts are those pages which contain figures.

Mr. Rathbun: The report itself, in other words, the financial report.

The Court: Not anyone's opinion as to what it shows.

Mr. Rathbun: No statement by the officers.

The Court: Very well, with that understanding and with that limitation these documents may become an exhibit. We are using what for the company?

The Clerk: Numbers.

(Testimony of George L. Schmutz.)

Mr. Vitousek: I think we can give them one number and letter them.

The Court: That's my thought. [1384]

The Clerk: Are these offered?

The Court: Just a minute. I think they were simply marked for identification. Yes, they are now company's exhibit "A" for identification. So you had better technically offer them.

Mr. Vitousek: As I recall, they were marked for identification on the testimony of Mr. Austin yesterday.

The Court: That's right.

Mr. Vitousek: If the Court please, we offer the reports in evidence, from 1924 to 1943, and ask that that portion of the reports showing the summary of the books of the company, the records of the company, be received.

The Court: Yes, with that limitation they may be received. It being distinctly understood that the matter in the forepart of each report reflecting someone's opinion as to what the figures show is not part of the evidence.

The Clerk: That will be Honolulu Plantation Exhibit No. 13-A to 13-T inclusive.

The Court: 13-A to T?

The Clerk: 13-A to 13-T inclusive.

(The documents referred were received in evidence as Honolulu Plantation Company's Exhibits 13-A to 13-T inclusive.)

Mr. Vitousek: If the Court please, in going through these after they had been marked for iden-

(Testimony of George L. Schmutz.)

tification yesterday, I [1385] noticed that in some places there are pencil figures.

Mr. Rathbun: They are not ours.

Mr. Vitousek: I do not believe the pencil figures could be received. It shows somebody's computation. Only the printed matter should be received.

The Court: Yes, only the printed figures.

Mr. Rathbun: Now, if your Honor please, in the cross-examination of this witness I have marked for identification as Government's Exhibit No. 1, table 1, attached to the claim that I have been referring to as being the claim filed in Congress, or prepared for the purpose of filing in Congress. I want to ask the Court that the whole book, the document that I am using, be marked for identification.

The Court: Very well, it may be marked for identification. Is there any need to give it a different marking than that?

Mr. Rathbun: We have only one page and we can make it the whole thing, Exhibit 1 for identification.

The Court: I think that might be satisfactory, rather than having two marks. Very well. That was Government's Exhibit—

The Clerk: No. 1 for identification.

The Court: —1 for identification, enlarged to become the whole Congressional claim document.

(Document referred to was marked "U. S. Exhibit 1 for identification.") [1386]

(Testimony of George L. Schmutz.)

By Mr. Rathbun:

Q. Mr. Schmutz, since the adjournment yesterday, have you found out whether or not this Government Exhibit No. 1 for identification was actually filed with Congress or some committee of Congress? A. I made no investigation.

Q. You didn't ask? A. No, sir.

Q. On table 1 of this Government Exhibit 1 for identification, as you testified now in this case, are you cognizant of the fact that in the amount of money shown as net income available for interest on the investment that there is included in the year 1937 compliance payments paid by the U. S. Government? A. Yes, sir.

Q. Do you know how much they were for that year?

A. I don't recall off-hand but they are in the report.

Q. What are those compliance payments?

A. It's a benefit payment made for a subsidy by the Government for the production of raw sugar.

Q. It is a subsidy, is it?

A. It is a subsidy in lieu of permitting the price of sugar to rise.

Q. Wasn't the purpose of it for an economic reason so far as the sugar industry in Hawaii was concerned? [1387]

A. Yes, in addition to the further fact that the Government has had a policy apparently to pre-

(Testimony of George L. Schmutz.)

vent the price of sugar from seeking its competitive level.

Q. You have stated that. You answered my last question? A. Yes, sir.

Q. In other words, Cuban sugar and beet sugar were competitive factors so far as the Hawaiian sugar market is concerned, were they not, at the time this was put into effect?

A. I don't recall the reasons for it.

Q. I didn't ask you that.

A. Well, I do not know the fact.

Q. You don't know the fact as to whether they were? A. That is correct.

Q. You never investigated that?

A. No, sir.

Q. Wouldn't that have some materiality, if it were a fact, in your conclusion that this was a sound company, successful, and so forth?

A. It wouldn't affect my opinion.

Q. It wouldn't affect it at all? A. No, sir.

Q. In the year 1937, this shows the compliance payment—we'll take the first year that it shows up. In the year 1943, in which year this company paid a dividend of \$150,000, and showed net income available for interest on the investment [1388] of \$186,969, were you cognizant of the fact that making up that sum of money available as net income for interest on the investment \$177,416 was paid by the U. S. Government under this subsidy?

A. If that is the figure, that is in the report.

(Testimony of George L. Schmutz.)

Q. Are you cognizant of that as you testified in your opinion of this case?

A. Yes, I am, if that is in the report.

Q. Did you have that figure in mind when you gave your opinion?

A. Yes, but you must remember that that one hundred eighty-six thousand figure isn't correct.

Q. Well, just answer my question, please. We'll attend to the correction.

A. Will you read the question?

(The reporter read the question referred to.)

A. If that's what the book shows, I was cognizant of it.

Q. In the earnings of this company for that year, the net income was a little less than ten thousand dollars, excluding that compliance payment, wasn't it?

A. I do not believe that to be a fact.

Q. You do not? A. No, sir.

Q. Do you believe the annual report of this company? A. I do. [1389]

Q. Was it \$190,000 as shown by that report? (Handing book in evidence to witness.)

A. The annual report for the year ending December 31, 1943, at the bottom of page 14, shows a net profit for the year ending December 31, 1943, transferred to surplus, of \$190,302.78, but out of that has been taken—

Q. Never mind what's been taken. You answer the question. A. You're not being fair.

Q. Now, I'll tend to whether I'm fair or not.

(Testimony of George L. Schmutz.)

I move that that answer be stricken, if your Honor please.

Mr. Vitousek: If the Court please, we object to the answer being stricken. The witness has a right to explain his answer. He has been shown the book and asked if he took into consideration certain facts. He said that only ten thousand dollars some odd were shown. Now, the witness is explaining what is correct. He is entitled to explain his answer.

Mr. Rathbun: And he is entitled to say that I am unfair in explaining that answer?

Mr. Vitousek: Maybe you were in shutting him off.

Mr. Rathbun: Well, I think he was unfair—I'll answer it that way—all the way through.

The Court: The witness may explain his answer.

A. May I have the report to explain it? [1390]

Q. I don't know what explanation is necessary. I have asked you for the amount and you have answered it.

A. The explanation is briefly this, that you will find up above in the cost of operations there has been an arbitrary deduction of \$44,210.62 for the amortization of leaseholds and a deduction of \$189,305.82 as an arbitrary deduction for depreciation.

Q. Are you through now? A. Yes, sir.

Q. The earnings from the production of sugar for that year were not \$190,302, were they?

A. No, that is correct, they were not.

Q. Now, you disagree with this statement? Is that one of the items that you had reference to

(Testimony of George L. Schmutz.)

when you said the figures in the column of net income were incorrect yesterday? A. Yes, sir.

Q. That's the extent of the error, is it?

A. No, sir.

Q. The difference between \$186,969 and \$190,302?

A. No, sir, a recasting of that statement that you have before you—

Q. Is that one of the things?

A. That is, yes, sir, that is one of them.

Q. All right, as far as that amount is concerned, the difference was only six thousand, four thousand dollars? [1391]

A. No, the difference would be \$189,000 plus the \$44,000.

Q. One hundred eighty-six less-taking off of one hundred ninety—

A. It would be one hundred eighty-seven. There were two items, the one hundred eight-six thousand and forty-four, as I recall.

Q. I didn't ask you about the forty-four. I said so far as the items shown on this exhibit as net income is concerned, and the items shown as net profit in the exhibit for 1943, the annual report, the difference is about four thousand dollars on those two items, isn't it?

Mr. Vitousek: If the Court please, I think we are entitled to have this exhibit, what exhibit counsel is referring to. He's been talking about—

Mr. Rathbun: I said '43.

Mr. Vitousek: I'm not a witness. You don't

(Testimony of George L. Schmutz.)

need to argue with me. I'll state my position and the Court can decide whether I am right or not.

The Court: I can clear it up. First, the first document that the question referred to, which mentions table 1 was Exhibit 1 for identification. And the other was a part of Exhibit 13 for identification.

Mr. Rathbun: Part of exhibit what?

The Court: Thirteen, not for identification; part of [1392] 13 actually.

Mr. Rathbun: This is part of the whole bunch.

The Court: It should have a letter on it, 13 what.

Mr. Rathbun: That's the year 1943.

The Clerk: It's 13-T.

Mr. Rathbun: For 1943.

Mr. Rathbun: Now, in 1942—

The Court: I'm not sure that the question was answered. Does the record show an answer?

(The reporter read the last question.)

A. Well, in answer to your question, I do not follow your arithmetic.

Q. In what respect don't you follow it?

A. I don't see how you get four thousand difference, or six thousand, or whatever you said.

Q. Isn't the difference between \$186,000 in round figures and \$190,000, four thousand dollars?

A. The difference between those two figures is four thousand dollars.

Q. That's what I asked you.

A. Then that is correct.

(Testimony of George L. Schmutz.)

Q. In the year 1942, on the figures shown under the condensed statement of profit and loss in this annual report for that year, is an item of \$250,-004.92, conditional payments under the sugar act. That's that subsidy we have been talking [1393] about?

A. Yes, sir.

Q. And the net profits for that year were \$233,-668.37, using that figure in arriving at that result, is that correct?

A. Are you talking about transferred to surplus at the bottom of the page?

Q. Yes, I am.

A. Yes, the report for the year 1942 shows there was transferred to surplus at the end of the year \$233,668.37.

Q. And a dividend was paid in that year, wasn't it?

A. Yes, sir.

Q. The dividend was paid on the basis of net profit transferred to surplus, shown in this report on that year, wasn't it?

A. Well, I suppose it was.

Q. Well, do you know?

A. No, I do not.

Q. Did you try to find out?

A. No, I did not. It was immaterial to me. I knew it was paid and I knew they had the money to pay it.

Q. I didn't ask you whether it was immaterial. I asked you a plain question.

A. I made no investigation.

Q. The document marked Government exhibit 1 in evidence, under the heading of net income

(Testimony of George L. Schmutz.)

available for interest on [1394] investment, in table 1, shows the net income to be \$28,005.44?

The Court: Exhibit 1 for identification.

Mr. Rathbun: Yes, your Honor.

The Court: May I have that figure?

A. That is correct.

The Court: What is the figure again?

Mr. Rathbun: \$28,005.44.

Q. Also included in this 1942 annual report in the figures which are used to obtain the result of net profit for the year is an item of \$194,230.10, U. S. Government condemnation award. Do you know what that is?

A. It was money received from the U. S. Government for—in payment of damages to crops, I believe, or perhaps for land taken or improvement taken. It was a condemnation award.

Q. In the year 1941, as shown by the annual report for that year, there is an item of conditional payment on the sugar act of \$256,682.96. That is this same subsidy that we have been talking about?

A. May I see that, please? (Mr. Rathbun hands exhibit to the witness.) Yes, that is correct.

Q. And that figure is used among other figures to arrive at the net profit for the year of \$187,140.46, is it not?

A. That is correct. That isn't the net profit for the year. That says transferred to surplus.

Q. It says net profit, doesn't it? Are you going to [1395] dispute the report?

(Testimony of George L. Schmutz.)

A. Pardon me. I am sorry. It does say net profit for the year transferred to surplus.

Q. I thought so. A. I apologize.

Q. In that year a dividend of \$187,140.46 was paid, wasn't it? No, strike that. \$150,000 dividend was paid, was it not? A. Yes, sir.

Q. In the year 1940, as shown upon the annual report for that year, among the items used to arrive at the net profit for that year is an item of \$271,388.26, conditional payment under the sugar act, is there not? A. \$271,388.26, that is correct.

Q. That's the same subsidy that we have been talking about? A. Yes, sir.

Q. In that year a dividend was not paid, is that right? A. That is the year 1940?

Q. Yes. A. There was not paid a dividend.

Q. For that year ended December 31, 1940, there was a deficit of \$382,098.78 in the surplus account, was there not?

A. Yes, in the surplus account there was a deficit, \$382,098.78. We are not talking about the surplus we were [1396] talking about before.

Q. Well, will you please answer my questions. Confine yourself to that.

A. Yes, sir, you were right.

Q. In the year 1939, as shown by the annual report for that year, among the items used to arrive at the sum of \$197,559.11 as a loss for that year transferred to surplus, there is included an item of \$210,182.75 as a conditional payment under the sugar act, is there not? A. That is correct.

Q. And that is this same subsidy that we have

(Testimony of George L. Schmutz.)

been talking about? A. That is true.

Q. It showed a loss for that year of \$197,559.11, didn't it?

A. By this method of accounting, that is right.

Q. Well, it's their method of accounting, isn't it?

A. That right, right.

Q. Are you going to dispute it?

A. Well, I dispute the reasonableness of it from the standpoint of getting at the earnings of the property.

Q. You wouldn't use it yourself the way they have it?

A. I did not use it the way they have it for the reasons that I have mentioned before.

Q. You still insist in saying that the earnings of this [1397] company, the earnings record, was one of the things you considered?

A. I didn't hear the question.

(The reporter read the last question.)

A. That's one of the matters which I took into consideration.

Q. In the year 1939 the company had a deficit in the surplus, deficit in the surplus account of \$548,585.86, did they not? A. That is correct.

Q. They paid no dividends in that year either, did they?

Mr. Vitousek: What year was that?

A. That's true—'39.

Q. Not surprising, is it? As shown by the annual statement of 1938, this company showed a loss at the end of that year of \$333,629.93, didn't they? A. That is correct.

(Testimony of George L. Schmutz.)

Q. And they showed a deficit in the surplus account for that year, at the end of that year, of \$378,498.12, is that correct?

A. I do not have the figures. (Mr. Rathbun hands book exhibit to witness.) The deficit shown is \$378,498.12.

Q. Now, one of the effects of these deficits in surplus account and losses in earnings for the year to carry on business they have to call on their credit, don't they, with the [1398] bank?

A. No, sir, that is not true because this several hundred thousand dollars each year which has been charged for depreciation and amortization is money which has been earned and charged off on the books to show those losses.

Q. They haven't got the cash, though, have they?

A. Certainly they've got the cash.

Q. In surplus?

A. Not in the surplus but they've got it in the earnings for the year.

Q. If they wanted to bring their surplus even they'd have to go and call on their credit, wouldn't they, the bank?

A. If that were necessary, yes, but in this particular—

Q. If they needed the money?

A. If they needed money—

Q. For the surplus account?

A. For the surplus account. But if they didn't need money for operations, that would be different. In this particular year there was two hundred forty-six thousand dollars of money that they

(Testimony of George L. Schmutz.)

earned that they arbitrarily charged off the books for depreciation and amortization of leasehold, which is money they did not spend.

Q. Did you know whether during the years 1939, 1940, '41 and '42 they went to the bank and borrowed money? A. No, I did not. [1399]

Q. Did you try to find out before you gave this opinion you have given here?

A. No, sir, I did not. I don't think that the value of any property of this kind would be predicated upon the earnings of two, three or four years.

Q. Oh, all we could make in more than two, three or four years. That's what's bothering you. In the year 1937, as shown by the annual report for that year, among the items used to arrive at a net profit of \$407,361.42 is the sum of \$138,495.17 as estimated accrual under the sugar act of 1937. Is that this same subsidy we have been talking about?

A. If you will let me see it, I will tell you. (Mr. Rathbun hands book exhibit to witness.) Yes, sir, that is correct.

Q. Why do they say "estimated" there?

A. Frankly, I don't know.

Q. Well, you had been led to believe that it hadn't been paid yet, wouldn't you?

A. No, I don't think so. Wait. Pardon me. I would be let to believe that.

Q. I thought so. What year did these subsidies first go into effect?

A. Well, it's called the "Sugar Act of 1937," and whether there was any subsidy paid in that year or not, I don't know.

(Testimony of George L. Schmutz.)

Q. Now, you said yesterday when I was asking you questions [1400] about this Government Exhibit 1 for identification, that the amounts in the column under net income available for interest on investment were not correct. Will you please point out in what respect they are not correct?

A. Well, let us take the year 1943, which is the last one for illustration.

Q. Yes?

A. The amount shown at the bottom of the page as net profit transferred to surplus was \$190,302.79.

Q. Now, you are not talking from the document, Government Exhibit 1 for identification, are you?

A. I am talking from figures which I have in my hand, which were copied from that document.

Q. Will you please confine yourself to my question and have in mind the figures on table 1 in Government Exhibit 1 for identification?

MR. VITOUSEK: If the Court please, the question was—he made a statement there that it is not correct. Why are they not correct? And the witness is explaining. I think he is entitled to do that.

MR. RATHBUN: Well, there is no use of getting into a mix-up as to what we mean. The item that I am directing his attention to appears on that column as \$186,969.88, for 1943.

MR. VITOUSEK: Well, we still maintain—

MR. RATHBUN: To what extent is that incorrect?

THE COURT: The question is clear.

A. It is incorrect for these reasons, that, first, the amount shown as transferred to surplus, \$190,302.78, that includes a deduction, a book deduction,

(Testimony of George L. Schmutz.)

for depreciation of \$189,305.82. It includes a further deduction for amortization of \$44,210.62. It includes an item for loss on equipment, discard of \$3,555.65. It also includes damages to growing crops of \$440.40. It also includes the sale of labor and supplies to others in the amount of \$14,706.68. It also includes an item for liquidated damages to fields in the amount of \$2,550. It also includes the sale of second-hand bags in the amount of \$7,467.86. It also includes profit on the service station of \$2,021.23. It also includes crop loss, land reclaimed by the Navy, \$3,815.19. It also includes loss on crops, fields converted, of \$662.81. Now, these are all figures that were taken from that same report, Exhibit 13, for the year 1943. And when those pluses and minuses are taken into consideration, the net product for that year, 1943, instead of being as shown on table 1 marked for identification, \$186,-969.88, would appear to be \$404,666.70.

Q. Now, you object, in other words—the error that you mentioned yesterday is the method of arriving at that sum, whatever sum it is, is that right?

A. It isn't a question of method. It's a question of purpose. [1402]

Q. Well, purpose, then. The purpose is shown on table 1 as being net income available for interest on investment, so far as that document is concerned, isn't it?

A. That's the way the table reads, yes, sir. And that isn't exactly what it is.

(Testimony of George L. Schmutz.)

Q. Well, it was filed that way and you used that exhibit in your report, didn't you?

A. That is correct.

Q. When did you discover this that you have just testified to, to change all that?

A. After my—in the last month I made the discovery.

Q. Did you check it at the time that you prepared this claim for Congress to see whether or not it was correct?

A. These tables were prepared for me in San Francisco in the office of the Honolulu Plantation Company. And—

Q. And you just accepted them?

A. And I accepted them without checking them, yes, sir.

Q. But this time you didn't accept them that way?

A. This time I checked them, that is correct.

Q. What caused you to make that check?

A. If I was going to be subject to cross-examination, I certainly wish to verify a lot of figures before I use them. That was one purpose. And the second purpose was that I accidentally discovered that there happened to be an error in that column. [1403]

Q. Well, on your first reason, you would check them if you were going to testify in a case under oath?

A. That is correct.

Q. Don't you think it is just as solemn to check them to see that they are correct when you

(Testimony of George L. Schmutz.)

appear before a committee of the U. S. Congress?

A. I do.

Q. And try to establish a claim of three million dollars against the United States? A. I do.

Q. But you didn't do it? A. That's right.

Q. Getting back to the year 1943 again, the Honolulu Plantation Company meant to tell the public by filing this annual report for that year that the net profit for the year ended December 31, was \$190,302.78, did they not?

A. According to their method of bookkeeping, that is correct.

Q. And you disagree with that method?

A. Well, it was made for a different purpose. It was not—

Q. All for a different purpose. You disagree with it, then?

A. Well, I disagree that that isn't a true reflection of what the net profit was. [1404]

Q. Do you know of any reason why they should seek to make it anything other than what it was really?

A. Well, I was interested in the enterprise and not their peculiar method, not peculiar method but method of keeping books in setting up the depreciation of the amortization, and particularly in taking up the consideration of the non-recurring items of expense or non-recurring items of income, such as condemnation awards, and so on.

Q. Do you know if the Honolulu Plantation Company at any time in any of these years had

(Testimony of George L. Schmutz.)

taken the trouble to correct these reports as they are filed? A. No, sir.

Q. To that extent? A. No, sir.

Q. Never have, as far as you know?

A. No, sir. In other words, this report was made for the purpose of reflecting the condition of the company.

Q. I didn't ask you the purpose, did I?

A. Very well.

Q. When that report is filed with the public body in this Territory for these years, and any member of the public that goes and looks at it, has a right to believe that the earnings are as they are set forth, has he not? A. He has.

Q. And that may have influenced the purchase of stock [1405] by some people that bought stock in the company, don't you think so?

A. You mean referring to this one item, without looking back to see how it was made up?

Q. What they state to be the net profit for the year, that item?

A. Well, I would say that it would be an uninformed purchaser who would rely upon that figure.

Q. You would? You said that one of the things you took into consideration here in arriving at this value was the public response to their stock, didn't you? You meant by that in purchasing this stock?

A. That is right, but—

Q. That answered my question.

A. Well, I'd like to explain.

Q. Well, there is no explanation necessary. That can be answered Yes or No.

(Testimony of George L. Schmutz.)

Mr. Rathbun: I submit that he's answered it.

The Court: The witness may answer a question Yes or No and is also entitled thereafter to give his explanation.

Mr. Rathbun: I object to it as not responsive. Exception.

A. The reason I believe the public would be uninformed if they stopped at that figure is because in some of these cases that figure happens to be composed of as much as one [1406] hundred eighty thousand dollars of award, condemnation award, which they wouldn't expect to get in subsequent years; and there are other items of non-recurring income or perhaps non-recurring expense, which are reflected in this item.

Q. Are you through, now? A. Yes, sir.

Q. Do you know whether or not this is the same report they gave the S.E.C. for the same years? A. I do not know.

Q. Did you try to find out? A. I did not.

Q. Now, you used the expression in your testimony yesterday, in fixing a time, as of the time when these leases were renewed, or most of them—what year was that, now, that you used yesterday, so there will be no confusion about it?

A. I used for what purpose?

Q. I don't know what purpose it was. I have forgotten.

Mr. Vitousek: May I have that question read? I submit it is not intelligible and I object to it. He used a time. We used a lot of times.

The Court: The question may be read.

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

Q. I think you used in connection with the statement that it "became a new enterprise from then on."

A. In 1936. [1407]

Q. 1936? Now, why did you take that particular year of 1936?

A. Take it for what purpose?

Q. For any purpose? The purpose that I just stated what you said.

A. I said it became a new enterprise in 1936.

Q. Because of the fact that they had these lease renewals in that year?

A. Yes.

Q. Did they have the renewal of all of their leases in 1936?

A. I thought they did.

Q. Well, did you find out the fact about it?

A. I did. I made investigation from the company and also from counsel regarding the effect of certain leased documents.

Q. And you found that all of their leases expired and were renewed in '36?

A. Substantially.

Q. You acted on that assumption, then?

A. That is correct.

Q. In your opinion in this case, in giving your opinion in this case?

A. Yes, sir.

Q. Are you familiar with an exhibit in this case, 9-C, being a lease with one McCandless and the Honolulu Plantation [1408] Company, dated December 28, 1929?

A. I read the lease but I do not recall the features of it.

(Testimony of George L. Schmutz.)

Q. Is that one of those that you said was renewed in '36 or not?

A. I am not sure whether it was or not.

Q. You don't know? A. No.

Q. You still took that into consideration in fixing—you took '36 in fixing this enterprise because the lease had been renewed?

A. Well, I made no computations as of 1936.

Q. Why did you mention it, then? What is the significance of presenting a new enterprise?

A. Well, had the appraisal been made in 1935, for the purpose of illustration, with leases that were just to go out, and the probability that some of them might not be renewed or those that were renewed might have to be renewed at higher figures, there is the question as to how much value you'd put on the enterprise with only a year of continued use of the land.

Q. What was the significance of your statement that it thereby became a new enterprise?

A. Because they had their leases fixed up for another 30 years.

Q. As of '36? [1409]

A. In other words, they had the rights of use and enjoyment of certain lands for another 30 years at that time.

Q. As of 1936? A. That is correct.

Q. Are you familiar with the lease in evidence as Exhibit 9-D, being a lease from Francis Brown to the Honolulu Plantation Company, dated November 5, 1936?

(Testimony of George L. Schmutz.)

A. I saw all of those leases but I don't recall—

Q. What was the term?

A. I don't recall the terms of those leases.

Q. Are you basing your opinion on that partially, aren't you, in valuing this, in testifying to this value that you have done in this case?

A. Well, I think I can explain that to you.

Q. There's no explanation necessary if you will just answer my question.

A. I base my opinion upon the assumption that as of the date of the first taking here there's 4,283 acres to which Honolulu Plantation Company had the right of use and enjoyment. Now, whether that was in one lease or another lease was immaterial.

Q. Are you through? A. Yes, sir.

Q. Are you familiar with Exhibit 9-E, a lease from the so-called Aluli heirs and Honolulu Plantation Company, dated [1410] May 28, 1935?

A. I saw that lease also.

Q. In connection with any statements you made, you had that lease in mind, did you?

A. I had in mind all of the leases which comprised the 4,283 acres of cane land.

Q. Did you have that lease in mind?

A. If that was one of the leases, I had it in mind.

Q. But do you know whether it was or not?

A. Offhand I don't recall. I know that that was, that there was an Aluli lease and there was a Bishop lease and Queen Emma lease, Damon lease, various others.

(Testimony of George L. Schmutz.)

Q. I'll get to all of them and ask you about it.

A. Well, I can give you one answer to answer all of your questions.

Q. Well, just sit there and answer them. Were you familiar with Exhibit 9-F, a lease from the Oahu Sugar to the Honolulu Plantation Company, of January 17, 1941?

A. Yes, I read it.

Q. Did you read that lease, did you?

A. I read all of them.

Q. Well, you remember that one?

A. I don't remember any of the details, no.

Q. As you sit there now, do you know the term of it?

A. No. [1411]

Q. Did you when you gave your opinion yesterday, did you have it in mind?

A. I had all of these leases in mind.

Q. But you didn't know the term of it yesterday, did you?

A. Not that particular—

Q. Or today?

A. Not that particular lease, no, sir.

Q. Exhibit 9-G, lease 6600 of the Bishop Estate, with the Honolulu Plantation Company, dated July 1, 1940, did you have that lease in mind when you gave your opinion?

A. That was one of the leases—I did.

Q. Did you have in mind the term under that lease?

A. No, not particularly.

Q. You didn't know, as you sat there yesterday and gave your opinion, is that right?

A. That is correct.

Q. Exhibit 9-H, a lease with the Austin Estate

(Testimony of George L. Schmutz.)

and Honolulu Plantation Company, dated December 15, '41, did you have that one in mind?

A. Same answer.

Q. You didn't know the term?

A. Same answer.

Q. Exhibit 9-I, lease of the O.R. & L. with Honolulu Plantation Company, dated July 24, '36, did you have that in [1412] mind?

A. I had that in mind if that was one of them.

Q. Did you have the term of it in mind?

A. No, not specifically.

Q. Exhibit 9-J (being a lease to the Queen Emma Estate to Honolulu Plantation Company, dated March 2, 1937, did you have that one in mind?

A. If that was one of them, if that was one of them, I did.

Q. But you didn't know the term, didn't have that in mind when you gave your opinion?

A. Not specifically.

Q. 9-K, a lease with the Damon Estate and the Honolulu Plantation Company, did you have that one in mind?

A. If that's one of them. I did.

Q. Did you know its term?

A. I believe that that was, that was the one that had expired and that there was an exchange of letters and an agreement to renew the lease and an acceptance of it, and on advice of counsel I assumed that that was a binding contract to renew the lease.

Q. For how long?

(Testimony of George L. Schmutz.)

A. I forget the term now.

Q. You didn't know that when you testified, then, right?

A. No; as I say, I am basing my opinion upon the assumption [1413] there's 4,283 acres of cane land to which they had the right of use.

Q. I have heard you say that three times and I haven't asked you yet that question. You have answered my question.

Mr. Rathbun: May we take a recess now, your Honor?

The Court: Yes.

(A short recess was taken at 10:05 a.m.)

After Recess

By Mr. Rathbun:

Q. In Exhibit 9-K, which is the so-called Damon lease, it is recited that there are 1223.91 acres of cane land. Are you familiar with that?

A. I read the document.

Q. Applying the rate of a thousand dollars that you used to that, would amount to a thousand times that acreage, wouldn't it?

A. That is correct.

Q. If there is no lease with the Damons after the year 1943, that would make a thousand times that acreage difference in your opinion, wouldn't it?

A. That is right.

Q. In connection with the condemnation suit, will you please define for me business loss?

A. A loss to business would be a depreciation or a shrinkage in the amount of that portion of the value of the [1414] property which was not imputable to the physical property itself, and which

(Testimony of George L. Schmutz.)

might be attributable to a going concern, established business, enterprise, value or whatever you wish to call it, but it is something, it is an intangible in contradistinction to a tangible loss.

Q. You are the author of a book entitled "Condemnation Appraiser's Handbook," published in 1938, are you not? A. I am.

Q. And you were the author of the following language used in that book on page 137, all of the material, you were the author of it, weren't you?

A. I was.

Q. And you said there, did you not, on page 137: "Damages to business are not compensable in California."—Is that right?

A. That is correct.

Q. That is true in other places than California also, isn't it?

A. I believe that that is the general rule.

Q. You said further, did you not:

"It was held, indeed this is but another way of phrasing the real contention of appellant, as quoted from his brief, that business is property, and when the taking by the state or its agencies interferes with, impairs, damages or destroys a business, compensation may be recovered therefor. We are not [1415] to be understood as saying that this should not be the law when we do say that it is not our law." You wrote that?

A. That's a quotation from an edition—

Q. You put it in your book?

A. That is correct.

(Testimony of George L. Schmutz.)

Q. You put it in your book to illustrate your statement that damages to business are not compensable? A. That is true.

Q. Did you, in giving this opinion of value in this case, take into consideration the taking of land by the United States previous to the ones involved in this case?

A. No, my opinion of the value reported, of the damage reported, is based solely upon the losses which I assumed to have been made, namely, 1087 acres of cane land involved in this consolidated action.

Q. The cases that—I think I have asked you about it, I'm not sure—lands involved in a civil suit in this Court, No. 416, did you investigate at all the amount of land taken in that proceeding? That is not in this case. A. Oh, no, I did not.

Q. 430?

A. If they are not in this case, I did not investigate them.

Q. All right, then, you didn't investigate or know about what I asked you in 416, 430, 434, 436, 442 and 452—right? [1416] A. That is right.

Q. Assuming that after 1936 and previous to the first taking in these cases the Government took in those particular cases in excess of a thousand acres of land, or in the neighborhood of a thousand acres, what would be your opinion of how much that lowered the before and after basis of the value of what was remaining?

Mr. Vitousek: May I have that question?

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

A. After 1939 and up to the present time, if that were the case, I would say that it would be at the rate of about a thousand dollars an acre.

Q. You'd use the same rate that you testified to heretofore? A. Yes, sir.

Mr. Rathbun: I assume, if your Honor please, that the Court will take judicial notice of its own files?

The Court: That's right.

Mr. Rathbun: In those cases.

Q. Now, in 1939, up to that time this company was able to make replacements of the cane that had been taken by the Government, have they not been?

A. Yes, there were replacements made at various times.

Q. Of other lands available?

A. Of other lands which were available. That is true. [1417]

Q. What replacements were used to take the place of the lands in the Hickam Field taking?

A. I don't recall. I have a record of replacements but I cannot tell you where they were.

Q. You can't? A. No, sir.

Q. You can't tell what land was used?

A. No, sir, I cannot.

Q. Can you tell what land was used to replace the land taken in Civil 416? A. No, sir.

Q. Can you in regard to the land taken in Civil 436? A. I cannot.

(Testimony of George L. Schmutz.)

Q. Can you in regard to the land taken in Civil
430? A. I cannot.

Q. Civil 452? A. No.

Q. Do you know whether or not after the Hickam Field taking the Honolulu Plantation Hickam Field taking the Honolulu Plantation Company put any item on their books of loss of any kind on those lands? A. I do not.

Q. Did you try to find out?

A. No, I did not.

Q. Do you know whether or not they put any item on their books of any loss sustained as a result of the takings [1418] in Civil 416, 436, 430, 452 and 442? A. No, I do not.

Q. And you didn't try to find out?

A. I did not.

Q. Has there been any item put upon the books of this company for any loss in connection with the takings of the land involved in these cases?

A. You mean a write-down of book value?

Q. Any kind to show any loss of the land, the use of the land.

A. I do not believe that the books have been adjusted for losses or increases in prices or for anything else. I think they are carried right straight through from the 1932 established value, with deductions for annual accruals of depreciation and additions for capital improvements.

Q. There is no item on the books specifically setting forth any loss as a result of the takings in the cases that we are trying here?

A. Not so far as I am aware.

(Testimony of George L. Schmutz.)

Q. Well, did you look to see?

A. Frankly, I did not.

Q. Just what significance did the previous takes, previous to the ones in these cases being tried, just what significance did the history of those takes have in connection with your opinion? You said you took them into consideration [1419] as history, as I remember your testimony.

A. That is true. In one of the studies which I made before forming my opinion, I took an over-all picture of the losses occurring from 1939 through to the present time for the purpose of getting the over-all picture in shrinkage.

Q. Still you testified that you can't tell how much you would value the shrinkage at on a before and after basis as to those takes?

A. That is true.

Q. Now, that's one of the things that you considered in arriving at this opinion of value, isn't it?

A. That's one of the many things.

Q. Yes, many things. That's one of them?

A. The point that I am trying to make is that valuation is not a mathematical process.

Q. I agree with you perfectly.

A. It is a matter of opinion.

Q. Just opinion?

A. It's opinion. It is a belief founded upon probable evidence.

Q. Like a Judge of the Supreme Court once said, it is a guess by an informed person, is that right?

(Testimony of George L. Schmutz.)

A. No, I don't agree that it is a guess.

Q. You don't agree with Judge Roberts on that?

A. If that is what he said, I don't agree with him. [1420]

Q. O.K.

A. I think it is an opinion instead of a guess, and there is a difference between those two words.

Q. Well, he is a little higher authority than you are in making those pronouncements?

A. He is, indeed.

Mr. Vitousek: If the Court please, we are going to discuss the merits or demerits of Judge Robertson?

The Court: That is concluded.

Mr. Rathbun: I'm through on that. Sorry to take so much time but I have to read figures all the time.

The Court: I appreciate that.

By Mr. Rathbun:

Q. Now, I believe you stated in substance that the output of the mill of the Honolulu Plantation Company before these takings was 20,000 tons and 15,000 tons thereafter, is that correct?

A. That is true.

Q. And you made that statement in connection with another statement that you made to the effect in substance that this would tend to depreciate the value of the mill because of over-capacity and increase of production cost and affect the fair return?

A. Fair return on the investment in that facility. That is correct. [1421]

Q. Now, when you said fair return you meant

(Testimony of George L. Schmutz.)

by increasing the cost of production less money could be made through the mill, didn't you?

A. I meant there wouldn't be enough to pay a fair return on the cost of the mill.

Q. That's earnings, isn't it?

A. Well, there must be earnings to pay interest on the cost of anything if its costs is to be synonymous with its value.

Q. I would think so. That answers the question. Over-capacity of the mill—what you meant to say by that was that the cost of, the monies that were in that mill to put it in the condition that it was previous to these takes couldn't return a fair investment, couldn't make a fair return on the amount invested in the mill because of a decrease in the acreage used to plant cane, is that right?

A. No, that is not right. What I meant by over-capacity was that there was just more mill there than could be used.

Q. All right. But that had an effect in your arriving at your opinion, didn't it?

A. That's one of the matters, yes, that I considered.

Q. Over-capacity of that mill would have no effect whatsoever except to decrease the earnings on the capital invested in the mill, is that right?

A. No, that is wrong. [1422]

Q. Well, wherein is it wrong?

A. Over-capacity simply means that you have a greater amount of capital invested than it is worth.

Q. What makes—

(Testimony of George L. Schmutz.)

A. In other words, the smaller mill costing less money would serve the same purpose.

Q. That's just another way of saying that it is over-capitalized so far as their sugar cane lands are concerned, is that right?

A. Well, I don't understand your use of the word "capitalize," because we are not capitalizing anything.

Q. All right, that's your answer?

A. That is right.

Q. If they had a million dollars invested in that mill and they expected to make a return of six percent on five thousand acres, and two thousand acres were taken away from them, that would have some effect on the value of the mill, you think?

A. I'm sure it would, for the reason that a cheaper mill would serve the same purpose.

Q. All right. When the Government took the lands involved in these cases here, the cane lands that they had under lease were in the same physical condition after they took them as they were before, weren't they?

A. You mean the remainder of the cane land?

Q. Yes. A. Yes, sir, that is true.

Q. Grow just as good cane?

A. That is true.

Q. And the same method that they were used for before?

A. There would probably be some adjustment there in rerouting water to get to some of these fields where fields had been cut off.

(Testimony of George L. Schmutz.)

Q. Leaving out the water, it didn't change the value at all of the cane lands, did it?

A. It would depend upon where it was. If the Government took from one end, then the answer would be no, it would not affect them.

Q. Well, assuming they didn't take it from one end, just in general?

A. Well, if they took it from the middle it would make quite a difference because there would be isolated portions which couldn't be used.

Q. You are talking about severance again, aren't you?

A. That is right.

Q. My question is, physically the character of the lands didn't change one bit and wasn't changed one bit by any of these takings?

A. It had the same configuration and it had the same improvement on it. [1424]

Q. And it would grow the same kinds of cane?

A. And it would grow the same kinds of cane.

Q. Every piece of machinery in the mill was in the same condition after these takings physically as it was before?

A. That is true.

Q. Didn't have any effect on the physical value of the mill machinery, didn't it?

A. Well, I don't know what physical value is.

Q. What someone would pay for them.

A. What someone would pay for them?

Q. Yes.

A. You are talking about market value, aren't you?

Q. All right.

A. Fair value?

(Testimony of George L. Schmutz.)

Q. All right.

A. Well, the takings had no effect upon the physical condition of the mill.

Q. That's my question.

A. But they did have an effect in my opinion upon the value of the mill.

Q. Of course, you have testified to that in your opinion. Physically it had no effect whatsoever, did it? A. On the physical condition, none.

Q. It is the same mill the day they took it and it was the same the day after they took it? [1425]

A. That is right.

Q. So that the only thing that was affected was a lowering in your opinion of the value because of this over-capacity, is that right, with the cane lands available?

A. Over-capacity, plus the further fact that because of its oversize it could not be used as efficiently as a mill which was properly designed for the new capacity.

Q. Now, what do you mean by "efficiently?"

A. With the same production costs, for illustration.

Q. Well, cost enters into it, production cost?

A. That affects the value of any machinery.

Q. Of course it does. You are now talking about operating costs, aren't you?

A. That's another phase of this same subject. That is right.

Q. It increases the operating cost, doesn't it,

(Testimony of George L. Schmutz.)

by lowering the cane area available for the use of that mill?

A. Yes, you're pushing around a lot of machinery there which is not serving any purpose.

Q. That's right. And it is only significant then to a man who would look at that property from the standpoint of how much he could earn on that mill with the land that is remaining after the takes?

A. Well, he wouldn't look at it that way, no sir. You cannot isolate these things and assign any particular amount [1426] of shrinkage to the mill or to the water supply system or to anything else. The prospective purchaser in the market will take a broad over-all view without attempting to find out what the components are as regards amount.

Q. In other words, he would disregard, you think a man that was looking at that plant for the purpose of making up his mind whether he would buy it or not, he would disregard entirely in the amount that he would pay for it the fact that the mill was geared to 20,000 tons and only 15,000 tons of raw sugar were available for use in the mill?

A. I didn't say that.

Q. Well, what did you answer to it?

A. He would take it into consideration but he wouldn't assign any particular amount of money to that feature.

Q. He'd pay less for it, according to your opinion?

A. He would.

Q. Because of that?

A. If he were buying the entire enterprise, he

(Testimony of George L. Schmutz.)

would pay less for the enterprise, and how much less he would pay for the mill I don't know.

Q. Because he would know that somewhere along the line there would be too much capital invested in it as compared to the amount of money that could be earned on the 15,000 tons, isn't that it?

A. That's right. [1427]

Q. Well, that's an earnings proposition, isn't it?

A. That is true. It is earnings that affect value.

Q. In the annual report of Honolulu Plantation Company for 1936, being 13-M, do you find therein any item setting forth any loss because of any taking of land by the Government?

A. I don't see any. (Referring to book exhibit.)

Q. All right. I will ask you the same question in regard to the annual report of 1937, being 13-N?

A. I don't see any.

Q. I will ask you the same question in regard to Exhibit 13-O, for the year 1938?

A. I don't see any.

Q. I will ask you the same question in regard to 1939, Exhibit 13-P?

A. I don't see any there.

Q. I notice an item in this last report, "Leased Land, Unamortized Balance, \$317,451.80." What do you understand that to mean?

A. It's a bookkeeping entry for the purpose of showing that there is an obligation to pay rent on leaseholds for the remainder of the term.

(Testimony of George L. Schmutz.)

Q. You consider the liability to pay rent an asset?

A. A liability, an obligation to pay rent is a liability, of course. And as the time passes and the rent is paid and crops are taken off the land, it becomes an asset. [1428]

Q. Well, this company set it forth as an asset, didn't they, to that extent?

A. It's a deduction.

Q. Well, they set it forth as an asset, didn't they?

A. Yes, this is shown as an asset and apparently is a reserve fund which has been set up and shown as an asset.

Q. You answered my question. It is shown as an asset? A. That is correct.

Q. In regard to the annual report of 1940, being 13—I guess it's G. I can't make it out.

The Clerk: Q.

Q. I will ask you the same question as to whether or not there is any item shown in that annual report in regard to any loss because of the taking of any lands? (Handing book exhibit to the witness.) A. I don't see any.

Q. I will ask you the same question about '42, which is exhibit 13-S?

A. Your question relates to any mark-down because of takings by the Government?

Q. Yes. A. I see nothing here.

Q. I will ask you the same question in regard to '43, which is Exhibit 13-T?

(Testimony of George L. Schmutz.)

A. Same answer. [1429]

Q. Now, this amortization item that appears on there, do you know whether or not that item would originate in this way, that when the Honolulu Plantation Company takes a lease on cane land, and it is raw land, brush on it and trees, and so forth, they have necessary expense in clearing it, preparing it for cultivation, do they not?

A. They do.

Q. And on their books haven't they handled that matter by putting down what they spent on it in that respect, and then amortizing that over the life of the lease downward each year?

A. That is probably true for tax purposes, for depreciation accounting.

Q. Well, that's the way they kept their books, wasn't it? A. I wouldn't say for sure.

Q. You don't know?

A. But I think that's right, but I'm not sure.

Q. On the document marked 13-T, the amount of that unamortized balance is \$267,864.78. On 13-S the same item appears under leased lands, does it not? A. Yes, that's right.

Q. So that there's been a depreciation from 1942 to 1943 of the difference between \$279,982.11 and \$267,864.78, is that right? (Handing to the witness two book exhibits.) [1430]

A. That is correct.

Q. And that's the way they kept their books, wasn't it? This tells you that, doesn't it? (Referring to books.)

(Testimony of George L. Schmutz.)

A. Yes, that is a representation of the books.

Q. In 1926, at the close of business for that year, they showed under the heading of "Permanent Improvements and Property Accounts, Houses and Buildings on Leased Land," \$237,210.91? (Handing book exhibit to the witness.)

A. That is correct, that's houses and buildings on leased land.

Q. That's right? They showed reservoir, pipe lines and ditches to the sum of \$643,609.65, did they not? A. That is correct.

Q. They showed railroads, \$565,075.15, did they not? A. That is correct.

Q. They showed roads, bridges and fences, \$93,968.20, did they not? A. That is correct.

Q. Now, each one of those items, year by year, is depreciated on the books, isn't it? A. It is.

Q. So that it reaches a stage dependent upon the rate per year where it completely disappears from the books, isn't that right?

A. No, for the reason that from time to time it becomes [1431] necessary to make replacements or capital additions to build it up.

Q. As to these items. Never mind replacement.

A. If there is nothing done to recapture any of the depreciation, eventually it will depreciate out to zeros on the books, that is correct.

Q. What rate of depreciation did this company use from 1926 on?

A. I haven't the slightest idea.

Q. You didn't try to find out?

(Testimony of George L. Schmutz.)

A. I did not.

Q. This might have all been depreciated out by 1944, as far as you know?

A. Conceivably. But it doesn't so show on the books.

Q. Well, now, you said you didn't know what was on the books.

A. I am talking about these, Exhibit 13.

Q. Yes. These items that I asked you about.

A. I think you will find corresponding items in the 1943 report.

Q. And they will be lower, wouldn't they?

A. Not necessarily. There may have been more money invested.

Q. All right, leaving out any extra investment, those items will disappear in time, depending upon the rate per year [1432] that is used?

A. That is right.

Q. In 1943, under the heading of "Permanent Improvements and Property Accounts," shown on Exhibit 13-T, do you find any item of houses, buildings, on leased land?

A. Yes, I do.

Q. What is the amount of it?

A. \$37,745.67.

Q. Do you find any item of reservoirs, pipe lines and ditches?

A. On leased land?

Q. Yes. A. Yes.

Q. I'm talking about leased land all the time.

A. Yes, \$326,981.54.

Q. Do you find an item of railroads?

(Testimony of George L. Schmutz.)

A. Railroads? Yes, \$36,097.13.

Q. Do you find any item at all covering flumes?

A. Flumes on fee but none on leased land.

Q. Leased land I am talking about.

A. I see none.

Q. There was an item on the '26 report on that, flumes on leased land, \$19,941.99?

A. Well, that's flumes but it doesn't say whether it is on fee or leased land. [1433]

Q. Well, it's an item? A. It's an item.

Q. And there's no item of flumes in the 1943 report?

A. There is for fee but not for lease.

Q. All right. Then if there was any on leased land in 1926, it has disappeared by 1943, hasn't it?

A. Quite possibly because of the amount here shown in '43 on flume for fee and nothing on leased land. So small.

Q. And that would be a fair conclusion from that, that it had depreciated, the item of flumes had been depreciated out from the books, is that right?

Mr. Vitousek: If the Court please, the witness has answered. It doesn't show in the first account under lease. He doesn't know whether it's on leased or not. He is asking an assumption: he has answered the assumption. I think the question has been asked and answered several times.

Mr. Rathbun: I haven't heard it to this question.

Mr. Vitousek: Well, if the Court please, I ob-

(Testimony of George L. Schmutz.)

ject to this questioning. Counsel stated in the beginning of this line of questioning that he is referring only to leased land. The witness on the stand said there is no item for flumes in 1926 under leased land. Now he comes back and asks if it disappeared. Now, is he still referring to the leased land or fee?

Mr. Rathbun: I am referring to flumes. [1434]

The Court: Assuming that it is on leased land, or rather—

Mr. Vitousek: Assuming there were flumes on this leased land.

By Mr. Rathbun:

Q. In 1943 there is no item of flume appearing on fee land or leased land?

A. Yes, there is on fee land.

Q. How much is it? A. \$405.13.

Q. Now, if those flumes are on leased land and the flumes in '26 in the item of \$19,941.91 are on leased land, it depreciated down to the latter amount, hasn't it? A. That is right.

Mr. Rathbun: May we take a recess?

The Court: Yes, we are due for our next recess.

(A short recess was taken at 11:10 a.m.)

After Recess

By Mr. Rathbun:

Q. I call your attention to the document marked 13-C, the report for 1926, and a note at the bottom as follows: "The following Assets are considered to be Investments on Leased Land. 'Houses and Buildings on Leased Lands.' 'Pump No. 6,' 'Reser-

(Testimony of George L. Schmutz.)

voirs, Pipe Line and Ditches,' 'Railroads,' 'Fumes,' 'Roads, Bridges and Fences.' "

Mr. Vitousek: Is that 1926? [1435]

The Court: Twenty-six.

A. Did you have a question on this?

Q. No, I didn't. I am calling your attention to that. You can assume from that through the years that those items were on leased lands that I have been asking about, can't you?

A. Let me see that again, please? (Mr. Rathbun hands book in evidence to the witness.) Yes, sir.

Q. Now, one more item, roads, bridges and fences.

Mr. Vitousek: May I see that?

Mr. Rathbun: Just a minute. Just one question and I'll be through with it. Do you want to see it now?

Mr. Vitousek: Yes. (Book in question handed to Mr. Vitousek.)

Q. On the '26 report, under the heading of roads, bridges and fences, is an item of \$93,968.20, is there not? A. \$93,968.20, that is correct.

Q. And in 1943, as shown by the document marked Exhibit 13-T, that same item appears as \$12,267.38, does it not?

A. That was roads, bridges and fences on leased land, wasn't it?

Q. That's right. A. \$12,267.38.

Q. Over a period beginning with the year 1936 and ending in the year 1944, both inclusive, if you add up on table 1 [1436] Government Exhibit 1

(Testimony of George L. Schmutz.)

for identification, the net income available for interest on the investment on those years, you get the sum of \$1,700,408.29, do you not? If you want to compute it, you may. But we have added them.

The Court: The figure again?

Mr. Rathbun: \$1,700,408.29.

A. What years are those?

Mr. Vitousek: It's a mere matter of computation.

The Court: It's a matter of addition.

Mr. Vitousek: I don't think it is.

Mr. Rathbun: I have a right to ask the computation and base another question on it, so that we will know what we have in mind.

A. It's '26 to '44?

Q. Thirty-six to '44.

A. I am ready.

Q. What do you get?

Mr. Vitousek: What's that?

The Court: He just said he was ready.

A. I haven't checked my figure but I have \$1,-168,583.63.

Q. Well, somebody is wrong. Let's see.

A. What was your figure?

Q. \$1,700,408.

A. Well, now, wait a minute.

Q. Check those amounts. [1437]

A. Wait a minute. I checked with that—

Q. Thirty-six to '44 inclusive.

A. The pluses were \$1,700,408.67?

Q. That's right.

(Testimony of George L. Schmutz.)

A. Now, I took out the two years in which deficits are shown.

Q. That's right, \$531,825.04, that's what I have.

A. That's what I have.

Q. That gives us a balance of \$1,168,583.25.

A. Sixty-three cents.

Q. Well, 63 cents. A. Yes, sir.

Q. As it appears on this statement over those years, that latter sum was the amount of money they had which was available for dividends or interest on their investment, is that right?

A. That is the way it appears.

Q. By figuring up those same years, the dividends paid, the result is that they paid out \$1,875,000, isn't that correct, on those years?

A. \$1,875,000, that is correct.

Q. So that on the face of that document, then, they paid out \$706,417 over the amounts which were available for dividends.

The Court: The figure again?

Mr Rathbun: \$706,417. [1438]

A. That's the way it appears, that is correct.

Q. Did you, in the preparation of this Government Exhibit 1 for identification examine the statement consisting of 12 pages in the beginning of the document, which statement was signed by Honolulu Plantation Company, by Mr. C. F. Jacobson, president?

A. I did not see that until, oh, months after the report was prepared.

(Testimony of George L. Schmutz.)

Q. Well, at that time you knew that it was going to be used in connection with the claim, didn't you?

A. Yes, I did.

Q. It is stated in there that—on the first page of that statement—pardon me, the second page—

“The geographical location of the lands leased by Honolulu Plantation Company is such that the most economical point of delivery for cane grown by it is the Honolulu Plantation Company Mill in its present location which is owned by the Company in fee. The distance to other mills is so great that delivery to them would not only be impracticable but too costly.” Did you see that statement?

A. I probably did. I read the statement.

Q. Well, hearing it now, do you approve of that statement?

A. I haven't given any thought to it.

Q. Well, give it some, please. You considered the [1439] integrated enterprise, didn't you?

A. I did.

Q. Isn't that one of the features of it, the location of the mill?

A. With respect to its properties, that is true.

Q. Well, what do you say about that statement? Do you agree with it?

A. Well, it would tend to depreciate the value of the land; if they had to haul that cane away to the nearest mill would be the one of Oahu Sugar Company at Waipahu. I don't know. I hadn't given much thought to it.

Q. Isn't the Oahu Sugar Company, it seems to

(Testimony of George L. Schmutz.)

me it was stated here, buying the remaining lands of the Honolulu Plantation Company?

Mr. Vitousek: Now, if the Court please, we have absolutely no objection to that question being asked. It occurred after the date. We call the Court's attention to it and we will go into the matter.

The Court: This is the first reference to it.

Mr. Rathbun: This goes to credibility, that's all.

Mr. Vitousek: All right. It's O.K. with us.

A. Oahu Sugar Company did buy it.

Q. They have actually bought it?

A. So I am informed; that is, they bought a part of the property and C. and H., California-Hawaiian Sugar Company [1440] bought the other part of the property.

Q. How far is the Oahu Sugar Company's Mill from these lands?

A. I wouldn't care to hazard a guess, although some of their cane fields come up to these cane fields.

Q. You can't tell how many miles away the mill is?

A. No. I could scale it on the map

Q. Would you think it was seven miles?

A. Well, you are asking me to guess, and I don't care to do that.

Q. All right. On page 5 of that same statement by the president of the company this appears:

"Honolulu Plantation Company presents this picture: By efficient and far-seeing management and judicious use of large sums of stockholders'

(Testimony of George L. Schmutz.)

money, it welded a disassociated and unrelated number of ownerships of land into an efficiently integrated enterprise, economically balanced, and a homogeneous whole which has operated smoothly and profitably for over forty years.”

Did you have notice of that statement?

A. I don't recall it, but if it is in the document, I read it.

Q. It further says: “It speaks volumes for the ability of its management and the value built into the integrated business structure that from the date of its incorporation to [1441] December 31, 1938, it had paid to its stockholders in dividends Thirteen Million Four Hundred Eighty-two Thousand Dollars (\$13,482,000), in addition to retiring a bond issue of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000). Honolulu Plantation Company has now remaining to it an area of land under lease which can only be operated inefficiently, expensively, and therefore uneconomically.”

Did you have knowledge of those terms?

A. If that is in the document, I read it.

Q. Do you agree with those? That is their theory in this case, isn't it? That's one of the things you rely on in making a valuation?

A. Not on that statement.

Q. What?

A. I say not on that statement. But it is my opinion that there has been a shrinkage in the

(Testimony of George L. Schmutz.)

value of the enterprise by reason of the loss of the 1087 acres I assume to be lost.

Q. You considered their dividend record, didn't you?

A. That was one of the matters that I took into consideration. I took in the history.

Q. I didn't ask you about anything else.

A. All right, yes.

Q. All right. And you think it could be operated inefficiently, expensively and uneconomically as far as the remaining lands are concerned? [1442]

A. I think that it would be an inefficient and expensive operation with only 15,000 ton capacity, or with roughly 3200 acres of cane land. It is too small.

Q. If you adopt that language, then, expensively means from a cost standpoint, doesn't it?

A. Obviously.

Q. Operating cost? A. That is true.

Q. Operating cost goes up, then profit goes down?

A. All things being equal, that is true.

Q. You considered that in coming to your conclusion of value here, didn't you?

A. That's one of the matters that I took into consideration.

Q. A statement is also made by the president as follows:

"Over fifty percent of its invested capital has been dissipated and the value thereof destroyed as a result of the Government's constant attrition."

(Testimony of George L. Schmutz.)

What do you say about that statement?

A. If it's in there, I read it.

Q. Do you agree with it?

A. Of course, his statement refers to the losses commencing January 1, 1939, and that is bringing it up to the present time. I would say that it isn't greatly off.

Q. Well, then, that's adopting it as substantially [1443] correct, your opinion takes that into consideration among other things, is that right?

A. That is true.

Q. And it's one of the basis——

A. Wait a minute. That's as from 1939 to the present time and not as regards these particular takings.

Q. O.K. I show you table 9 on Government Exhibit No. 1 for identification, covering through the year 1945, and ask you whether or not in the last column under totals it can be properly said that that represents the invested capital for the different years opposite?

The Court: What page is that?

Mr. Rathbun: That's on table 9.

A. This is a computation that was made by men in the office of the Honolulu Plantation Corporation——

Q. I didn't ask you about that.

A. May I have that question?

(The reporter read the last question.)

A. That figure represents the values as set up

(Testimony of George L. Schmutz.)

on the books in 1932 less depreciation, plus capital additions.

Q. That is capital investment, isn't it?

A. Capital investment.

Q. That's what I asked you, wasn't it? Now in the year 1939 the capital investment was \$3,355,318.16, wasn't it?

A. That is right. [1441]

Q. The next year it goes down about a hundred thousand, a hundred and fifty thousand?

A. That is right.

Q. The next year it goes down about one hundred eighty thousand, one hundred seventy-five thousand?

A. That is right.

Q. The next year it goes down about two hundred thousand?

A. About one hundred forty thousand.

Q. One hundred forty thousand? The next year it goes down forty-six approximately?

A. Around forty-six thousand.

Q. Forty-six thousand, yes.

A. That's right.

Q. And the next year it goes down about thirty-four thousand, thirty-five thousand?

A. That is right.

Q. The next year it goes down ninety-seven thousand?

A. That is right.

Q. From 1939 to 1945 inclusive that doesn't show that fifty percent of the invested capital has been lost, does it?

A. Certainly not. It isn't intended to show what has been lost.

(Testimony of George L. Schmutz.)

Q. Well, answer my question, please.

Mr. Vitousek: If the Court please, he answered the question. We object to the counsel badgering the witness that way. [1445]

Mr. Rathbun: He's making a speech every time, and it has nothing to do with the question asked. It's not responsive.

The Court: The question was answered. Proceed.

Mr. Rathbun: All right.

Q. I show you table No. 2 in the document marked Government Exhibit 1 for identification, and call your attention to the items under cost per ton, 96°, and the word, abbreviation, Ref., and ask you to examine it with those in mind. Now, on that statement they are attempting to show the cost per ton to the refined state of sugar aren't they?

A. It shows, yes, it shows the cost of 96° sugar, raw sugar, and also the refined cost.

Q. Now, will you tell me, in the year 1940 what their cost of production was on raws, on sugar from their own plantation? Per ton.

A. The direct cost was \$60.73, and with a credit from the sugar because of the Sugar Act of 1937 of \$9.68 left a cost after credit of \$51.05 per ton of 96° sugar for the year 1940.

Q. Now, that document shows that they purchased some raw sugar for refining in the mill, doesn't it? A. It does.

Q. In that same year, what was the cost to get that to the refined stage?

(Testimony of George L. Schmutz.)

A. Wait a minute. You mean the cost of buying the raw [1446] or refining the raw?

Q. Refining.

A. It isn't broken down. The refining is all raws.

Q. I will direct your attention to it. They paid for outside raw sugar so much per ton, which they put under cost, did they not?

A. That is right.

Q. What did that raw sugar cost them?

A. \$48.84 per ton in 1940.

Q. And what did it cost them to produce raw sugar from the plantation? A. \$51.05.

Q. In other words, it cost them more to bring the raw sugar stage from their own plantation than it did to go out and buy the raw?

A. In that particular year, yes, about two and one half dollars more.

Q. How about the year 1941?

A. You want me to give these figures?

Q. Yes.

A. In the year 1941 it cost, the cost of the plantation raws was \$54.55, and the cost of the outside raws was \$61.76.

Q. Now, that year it happens to be bigger? It cost more to buy it outside?

A. Yes, about \$7.21 a ton more. [1447]

Q. Go to the next year, 1942.

A. In 1942 the cost of plantation raws was \$77.81. The cost of the outside raws was \$70.06.

Q. It cost more that year, didn't it?

(Testimony of George L. Schmutz.)

A. It did.

Q. Than it did to buy the raw sugar?

A. That is correct.

Q. How about the next year?

A. In the year 1943 the cost of plantation raws was \$70.80. The cost of outside raws or the price paid was \$69.79.

Q. So that in all buy one—is that the last year shown? A. No, 1944 is shown.

Q. All right, how about the next year?

A. In the year 1944 the cost of plantation raws was \$101.75. The cost of outside raws was \$71.04.

Q. A difference in how much a ton, over \$30?

A. \$30.71 difference.

Q. Is that the last year shown on that?

A. That is the last year shown.

Q. So that in all but one year they could buy raw sugar and put it through their mill at less cost than they could do it from their own plantation, is that right? A. What table is that?

Q. Just answer what I asked you.

A. Well, I have to check it. I don't recall.

The Court: He asked what table it was. Table 2.

The Witness: Now, will you repeat the question?

(The reporter read the last question.)

A. Yes, that is true. That was the year 1941.

Q. That's right. Now, was that one of the matters that you took into consideration in what you have stated here about the consideration that you gave to things in arriving at your opinion?

(Testimony of George L. Schmutz.)

A. The cost of manufacturing raws, not in that way. I just took it into consideration generally.

Q. In that way I am talking about.

A. No.

Q. You didn't consider that at all?

A. No, sir.

Q. Did you ever know of these particular facts shown on that table 2 that I have inquired about previous to today? A. Yes, I did.

Q. When did you know about it?

A. At the time they were made up.

Q. Then you knew it when you testified here as to value? A. I did.

Q. Now, among other things that were represented to Congress in the filing of this claim, Government Exhibit 1 for identification, is the statement that they had a heavy burden of 20 years rent liability and a 20-year pension program which they would have to go on, pay. Do you recall that statement [1449] about that?

A. I do not recall it, Mr. Rathbun.

Q. It is stated on page 10, referring to the statement that I have been reading from at different times:

“Nevertheless the property that remains to this company must of necessity be operated at a loss, as it is clearly demonstrated. Furthermore, it must assume the burden of 20 years rental, 20 years pension obligations, 20 years rentals on the land which it has under leases for which it has a continuing obligation, and certainly it desires to provide for

(Testimony of George L. Schmutz.)

the pensions which it has in good faith agreed to pay to its longtime employees.”

Did you read that statement?

A. If it is in there, I did read it.

Q. Then you knew about it when you gave your opinion? A. Yes, I did.

Q. In this case. When did that pension situation go into effect?

A. I don't know anything about the pension situation.

Q. Did you ask about it? A. I did not.

Q. Did you ask about their rent liability to see whether that's accurate, whether it's an accurate statement, 20 years?

A. I was informed that they had an obligation, a leasehold obligation, to continue it. [1450]

Q. Ordinary business houses have a pension scheme; they set aside monies year by year to take care of it; they accumulate a fund?

A. Some do and some don't.

Q. This one didn't? A. I don't know.

Q. You don't know? Do you think it is good business to do it that way?

Mr. Vitousek: If the Court please, this is going pretty far afield, whether it's good business on pension matters. This is certainly not proper cross. And most of the morning we have been on matters that are not proper cross-examination, that I didn't bring out on direct. I hesitate to object, but when we get into whether it's good business or

(Testimony of George L. Schmutz.)

not on pensions, it's just wasting the time of the Court.

Mr. Rathbun: He said he took it into consideration.

Mr. Vitousek: He said he did not take it into consideration. He said he knew nothing about it.

Mr. Rathbun: Well, you know about that being stated, don't you?

Mr. Vitousek: Just a minute. I have an objection. Are you withdrawing that question?

The Court: It does seem to me that in the absence of the witness stating he knew about Honolulu Plantation Company's pension system that this pending question takes us pretty far [1451] afield as to what is good and bad pension practice.

By Mr. Rathbun:

Q. You knew about that statement before you testified as to the value in this case, did you not?

A. Well, I read the statement when I first saw it.

Q. Well, did you pay attention to it when you read it?

A. You mean did I read it word for word or did I believe it or what?

Q. Did you have it in mind when you testified to value here?

A. No, I did not have that in mind.

Q. You did not? All right, that settles it. Page 3 of your report in Government Exhibit 1 for identification states: Annual capital investments for the

(Testimony of George L. Schmutz.)
years 1936, '37 and '38, a total of the three being \$1,325,977.76. Is that reflected at all in table 9?

The Court: Table 9 being what?

Mr. Rathbun: Beg pardon?

The Court: Table 9 being what?

Mr. Rathbun: In this document..

The Court: But I mean, what is the general nature of 9?

The Witness: Book value of property investment.

Mr. Rathbun: Invested capital.

A. The increase there shows \$515,000 as of the first of 1939, January 1, '39, as compared to January 31, '36. [1452]

Q. Let's take from '36 to '37.

Mr. Vitousek: Increase there? What are you referring to? He showed both.

A. According to table 9, labelled "Book Value Property Investment," the book value as of January 1, '39, or December 31, '38, as shown, is \$3,355,318.16. And as of January 1, '36, it is shown as \$2,840,716.28.

Q. Yes?

A. Making an increase for that three-year period of approximately \$575,000.

Q. Your statement was a million three hundred twenty-five, wasn't it?

A. That is correct. I did make that statement.

The Court: Is this a good stopping point for the last recess?

Mr. Rathbun: Yes.

The Court: All right.

(A short recess was taken at 12:10 p.m.)

(Testimony of George L. Schmutz.)

After Recess

By Mr. Rathbun:

Q. Calling your attention again to table 9, Government Exhibit 1 for identification, at the bottom of that table there appears, Average per irrigated acre over 3196 acres, as of January 1, 1945, \$746.50; 5252 acres, as of January 31, 1939, \$454.25. By what process were those figures of \$746.50 [1453] and \$454.25 arrived at?

A. By division into this figure just above, called "Net Permanent Improvements."

Q. That's as of January 1, '45, is it?

A. That is right.

Q. To arrive at the per ton, or per acre rather, cost or burdened, shouldn't you divide the 5252 into the capital invested in the year '39?

A. No, I don't think so.

Q. You don't. A. No, sir, I do not.

Q. If you did that, it would make a big difference, wouldn't it?

A. If you were to use '39?

Q. Yes.

A. —Instead of—it would make a difference, there is no doubt about that.

Q. It would make a big difference, wouldn't it?

A. Well, I haven't figured it out. It would make some difference.

Q. The way I figure it, it would make \$170 per acre difference, at least.

A. In the bottom line figure?

(Testimony of George L. Schmutz.)

Q. Yes, these figures here. (Indicating in exhibit for identification.) [1454]

A. Oh, in the other figures?

Q. Yes. A. It may. You figured out—

Q. Where do you know of in the Territory of Hawaii of any cane land being sold for a thousand dollars an acre? A. I don't know of any.

Q. Do you know of any being sold over \$650 an acre, strictly as cane land?

A. No, I don't know of any sales.

Q. You don't know anything about the price of it? A. That is right.

Q. Did you make any investigation on that subject? A. No, I did not.

Q. You make the statement on page 4 of your statement in Government Exhibit 1 for identification:

“By way of summation, prior to the decimation of its sugar cane lands the company was a financially sound enterprise with a considerable capital investment in land, plant, water supply and irrigation system, and other facilities, that enjoyed annual net earnings adequate to support the capital structure, and was highly regarded by the public, as evidenced by the public's valuation of its shares.”

Do you remember that statement? That is your statement.

A. Well, if that is there, I made the statement.

Q. Well, did you have it in mind when you made your [1455] valuation in this case?

(Testimony of George L. Schmutz.)

A. I did.

Q. On table 1, attached to Government Exhibit 1 for identification, under the heading of per share in dollars is set forth, from the year 1920 to and including 1944, certain figures. Are those figures the stock-quoted price at those times?

A. Those were average yearly selling prices.

Q. On the market? A. On the market.

Q. The stock sold for in 1932 for \$10.60 a share then, didn't it? A. That's right.

Q. And so increases down the line until you get to 1936 when it went to \$30.12 a share?

A. That is right.

Q. Then it goes steadily downward from then on, doesn't it? A. It does.

Q. It goes down \$8.00 a share between 1937 and 1938? A. Yes, \$8.75.

Q. It goes down \$7.00 a share, lacking 12 cents, between 1938 and '39? A. Six dollars.

Q. Well, put it six dollars. [1456]

A. \$5.88.

Q. All right. A. The figure.

Q. And between the years, from 1939 to 1940, it went down? A. \$4.62.

Q. And in 1942 it went down to \$7.00?

A. That is right.

The Court: Down to \$7.00?

Mr. Rathbun: Down to \$7.00.

Q. And in '43 it came up to \$9.87; and in '44, \$10.25. Is that right? A. That's right.

Q. Are those the figures that you had in mind

(Testimony of George L. Schmutz.)

when you made the statement that it was highly regarded by the public?

A. Yes, that's what I had in mind.

Q. Now, you said something about the good management of this company in your statement, did you not?

A. I do not recall whether I said that or not. If it is there——

Q. You did. A. ——I did.

Q. What did you mean by that use of the words "good management?" [1457]

A. I meant an operation in which the management was able to get a reasonable degree of efficiency out of the materials at hand.

Q. Anything else?

A. And show a fair return upon the investment—yes, of course.

Q. Well, why did you hesitate so long? Management is an item——

Mr. Vitousek: Mr. Rathbun, will you point out where it is pointed out as to the management? It is in the president's report?

Mr. Rathbun: Page 5 of the President's statement, Honolulu Plantation Company presents this picture, "By efficient and far-seeing management and the judicious use of large sums of stockholders' money . . ."—did certain things.

Mr. Vitousek: If the Court please, the question stated what this witness had in his report; stated this witness had it in his report. That's what we have been talking about, and that's what I object to.

(Testimony of George L. Schmutz.)

Mr. Rathbun: I was doing it from memory. It doesn't matter which report, as far as I'm concerned. Do you understand now that it is? I think I can find it in his, but I am not going to take the time.

Q. You understand that I am referring now to what the president said? [1458] **A.** I do.

The Court: Would your answer be the same?

The Witness: The answer would be the same.

Q. Now, management. Just what significance does efficient management have as far as valuing the property of this company is concerned, as you have valued it?

A. Well, the process of valuation contemplates that property shall not be penalized because of poor management, inefficient operations. That is true of apartment houses, office buildings, and any other type. The question to be answered by the valuator is, what is the property reasonably capable of doing under ordinarily fair management, making uses of the facilities which are available?

Q. Keeping operating costs down would be one of them, wouldn't it?

A. Keeping operating cost down and keeping income up to what might be considered the normal level for that particular type of enterprise.

Q. That is the thing that the average person would be most interested in, wouldn't he, getting an income out of it?

A. That is the only reason anybody buys anything that is for income.

(Testimony of George L. Schmutz.)

Q. Yes, that's right. Now, management is of a nature that—its relationship to any one company, the operation of it, is somewhat fluctuating, isn't it? [1459]

A. I don't understand.

Q. Well, a good management might make money and a bad management might lose money for the same plant?

A. For one or two years, yes, but not over any period of time, because they'd get changed managers.

Q. I'm talking about the management up to the president, the owner of the company.

A. Well, the success of the enterprise really settles in the manager on the property.

Q. Well, never mind——

A. Spending money in doing——

Q. That isn't my question. Degrees of management so far as being efficient or inefficient vary, don't they?

A. They vary but tend to level out.

Q. One man might not make us money due to his lesser ability than another man with the same plant, isn't that true?

A. That is true.

Q. Did you consider this a good and efficient management in arriving at your values in this case?

A. I felt it was a normal management.

Q. Did you agree to the statement that the president made, that it was efficient and far-seeing?

A. I think the management was efficient. I think it was far-seeing.

(Testimony of George L. Schmutz.)

Q. That was your attitude when you gave your opinion [1460] of value here?

A. I have that in mind, yes.

Q. One of the items. Therefore, just what someone could make out of a piece of property, a plant, would depend upon that person's ability to operate it, wouldn't it? A. Naturally.

Q. And that's speculative, isn't it?

A. I don't get that at all.

Q. You don't get it at all? A. No, sir.

Q. If you are trying to arrive at how much anybody could make out of a plant, and you had one man over here and another one over here, as between the two of them, knowing their abilities or the lack of it, you would say that, or to attempt to say that what either one of them would make out of that plant, knowing about their management yourself and their ability—it would be uncertain and speculative, wouldn't it?

A. Well, certainly it would be uncertain. You never know what any man can do until it is done.

Q. That's right. O.K. That's one of the things you took into consideration in arriving at your value, wasn't it?

A. Yes, but for whatever weight it might have been given.

Q. Well, I don't know what weight it might have been given. You used it as one of the considerations. [1461]

A. I considered a great many things. Some of them I gave weight to and some I didn't.

(Testimony of George L. Schmutz.)

Q. I didn't ask you that. Now, I don't blame you for not pinning yourself down to any one thing, but please answer the question, will you?

A. I proceeded upon the theory that over a period of years the company had had normal management.

Q. Then you did take that into consideration in arriving at your value? A. I did.

Q. You stated in your report in connection with Government Exhibit 1 for identification on page 19, "As a result of the takings there followed a loss in the value of much of the aforesaid physical property." What did you mean by that?

A. I meant that the property would not sell for as much as it previously would have sold for.

Q. You didn't mean to say that the taking of this property affected any of the, physically affected any of the land or mill or machinery, did you?

A. I meant that it affected them value-wise.

Q. From the standpoint of price?

Mr. Vitousek: He has repeated the same line of questions as earlier this morning, about the physical aspects of the mill, as the Court will recall. He said he meant the value.

Mr. Rathbun: I didn't ask any questions directed to the [1462] question that I have asked now.

The Court: But not in relation to his statement in the Congressional claim. May we have the last question, Mr. Reporter?

(The reporter read the last question.)

(Testimony of George L. Schmutz.)

Mr. Rathbun: I'll ask another question.

Q. You said further because of the loss of land—this goes on from what I read there—“ . . . because of the loss of land to which they previously furnished irrigation water and/or for the reason that the remaining wells are more expensive to operate because of increased pumping costs to adequately serve the lessened and higher area to be irrigated;” do you remember that statement?

A. If it's there, I made it.

Q. Well, it's there, I guarantee you. Now, when you said it would be more expensive to operate, the only significance that that had in connection with value was that it would reduce the possible earnings?

A. It would reduce the amount of earnings which would be available for interest on the fair value of the property.

Q. And that's one of the things that you considered in arriving at your opinion of value here, was it not?

A. That was one of the things that I considered, yes.

Q. You further said, “Also a portion of the investment in the physical properties aforementioned is dissipated because [1463] of the resulting excessive cost in relation to the service rendered.” Your answer would be the same in regard to that statement?

A. That is true.

Q. You said on page 20, “The numerous losses of land have resulted in the permanent impairment

(Testimony of George L. Schmutz.)

of the ability of the remaining property to produce net earnings commensurate with the residual value as in the past, assuming compensation is paid for the shrinkage mentioned in the preceding paragraph." Now, is that your feeling about that today and was it when you testified to value in this case?

A. Will you reread it? What was that shrinkage in the preceding paragraph?

Mr. Rathbun: I'll read it again. I think he was mixed up.

Q. "The numerous losses of land have resulted in the permanent impairment of the ability of the remaining property to produce net earnings commensurate with the residual value as in the past, assuming compensation is paid for the shrinkage mentioned in the preceding paragraph."

A. What is that shrinkage in the preceding paragraph? Let me look at that, Mr. Rathbun. Maybe I can answer you, to save time.

Q. My question to you is whether you made that statement first. Do you remember it? (Handing document to the witness.) [1464]

A. Yes, sir, I did make it.

Q. You base your opinion in this case on the fact that numerous losses of land have resulted in permanent impairment of the ability of the remaining property to produce net earnings commensurate with the residual value, did you?

A. No, I didn't base my opinion. I took that into consideration but I didn't base my opinion.

(Testimony of George L. Schmutz.)

Q. Well, how did you take it into consideration if you didn't base your opinion on it? Will you explain that phenomena to me once?

A. As I tried to tell you before, what I did was to make a study of the over-all picture. Now, this is a discussion of some of the minutia which go up to make the over-all damage, and I didn't make any separate computations on these items because of increased production cost or decreased capital investment, or that's the overcapacity of the property and the shrinkage in value occasioned thereby. I didn't break any of those things down and then add them up and say that all of these add up to a certain amount of money.

Q. All right, are you through?

A. I am through.

Q. Did you consider it in arriving at your opinion?

A. I didn't—well, yes, I considered everything.

Q. That included, what I read you?

A. I considered that, yes. But that wasn't the way I [1465] reached my opinion.

Q. Well, how you reached your opinion, I don't know. But you considered it in arriving at the opinion you testified to in this case?

A. I considered it was one of the elements in there that was reflected by the condition which I found.

Q. You further said, "Briefly the reasons for this statement lie in the drastic decline in earnings which are caused by (1) the rapid increase in unit

(Testimony of George L. Schmutz.)

cost (e.g., per ton) due to decreased production, and (2) because of the decrease in volume of production." Do you remember that?

A. Well, if it is there, I said it.

Q. Well, it is there, I guarantee you. Now, did you consider that situation in arriving at your opinion of value in this case?

A. Yes, I considered that. But I didn't use it as the basis of my opinion.

Q. But you considered it? A. I did.

Q. After considering all of these things you then arrived at your opinion of value, is that what you try to say?

A. No, that isn't what I am trying to say.

Q. No? What's wrong with that statement?

A. What I'm trying to say is that I made an estimate of what the value of this property was as I saw it on one date and then made another estimate of the value of the property as [1466] I saw it on another date, irrespective of all of these conditions which you speak of, irrespective of those I came to the conclusion that there was a certain shrinkage in the value which appeared to be approximately a thousand dollars an acre.

Q. All right, are you through?

A. Yes, sir.

Q. You said further on page 22, "Obviously, therefore, Honolulu Plantation Company will be forced to operate at about 50% of its normal capacity (30,000 to 15,000 tons). The effect of this, as elsewhere herein shown, will be to greatly in-

(Testimony of George L. Schmutz.)

crease the per ton cost of production and greatly reduce the number of tons that can be produced." Did you have that in mind and consider it in arriving at your opinion?

A. In the same way as I have explained before, the answer is yes.

Q. All right. You said further, "At present, and as a temporary war emergency measure the Company has been able to purchase outside raws to take the place of the supply from lands expropriated by the Government. But, this substitution of supply does not leave the company in as good a pecuniary position as if the supply were produced on the Company's lands." Do you remember that statement?

A. I wouldn't, but if I did make it, I did.

Q. And you considered that in arriving at your opinion in this case? [1467] A. I did.

Mr. Rathbun: I think that's all, your Honor.

The Court: Redirect?

Mr. Vitousek: If the Court please, we have a lot of notes to go over in this matter. I suggest we take an adjournment at this time.

The Court: All right. I think that might be profitable. We will adjourn until nine o'clock tomorrow morning.

(The Court adjourned at 12:50 o'clock, p.m.)

Honolulu, T. H., December 12, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: The parties, I presume, are ready?

Mr. Vitousek: Ready.

The Court: And you, Mr. Schmutz, are mindful of the fact that you are still under oath and are about to be examined on redirect?

The Witness: Yes, sir.

The Court: You may proceed.

GEORGE L. SCHMUTZ

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Redirect Examination

By Mr. Vitousek:

Q. Mr. Schmutz, why did you come to Honolulu in 1940?

A. The primary purpose was to deliver a series of lectures on valuation at the request of the Honolulu Realty Board.

Q. While you were here for that purpose, you talked, had that luncheon you mentioned with Mr. Spalding?

A. I did.

Q. Now, Mr. Schmutz, you testified, as I recall it, [1469] that you were familiar with the annual reports of the Honolulu Plantation Company, referring to Exhibit 13-A to T inclusive?

(Testimony of George L. Schmutz.)

A. I did.

Q. Turning to 13-T and calling your attention to a blue printed sheet and series of figures attached to the end of that report called "Exhibit H" of the report itself,—that is, when I say "Exhibit H" I mean that "Exhibit H" is attached to Exhibit 13-T that has been introduced in evidence in this case—in general what does that show?

Mr. Rathbun: I object to what it shows. It speaks for itself, if your Honor please.

The Court: Isn't that so?

Mr. Rathbun: That would be his conclusion.

Mr. Vitousek: Well, if the Court please, it speaks for itself, true, but it is simply preliminary to the other question. I could recite what it shows and I think it is proper if the witness knows that it is proof of his knowledge what it really means. He said he is familiar with them. And if he is, he ought to be able to say what they refer to.

Mr. Rathbun: "What it really means" is outside of the province of this witness; it is for your Honor to say.

Mr. Vitousek: If the Court please, this witness testified that he based his information insofar as the financial and other affairs of this company were concerned upon these reports. Now, there was a lot of discussion yesterday about [1470] Government's Exhibit for identification in the cross-examination. This witness, however, said he based his securing of information from the records of the company and the reports of the company. Now, if

(Testimony of George L. Schmutz.)

he did, and he has testified here as an expert, if the Court please——

The Court: Are you referring to the conflict between the Congressional claim which is marked for identification here and the figures shown in these annual reports; is that what you are getting at?

Mr. Vitousek: Later we will get at that, if the Court please.

The Court: My recollection, on the basis of what you have last said, was not that the witness testified that he got figures from these annual reports as much as he said that they were figures supplied to him by the company.

Mr. Vitousek: On the compilation of that exhibit, but on his testimony here in court, in his testimony as to his opinion of the value, he based it on the reports, not on the figures shown in this exhibit. That is where the confusion has arisen. That's what we desire to bring out on redirect.

The Court: I'm not too sure. It seems to me he said he considered them, but we are getting apart from this.

Mr. Vitousek: I don't say based his valuation; I say secured his information. He said he didn't base his valuation on any one particular. [1471]

The Court: Well, so far as this particular objection is concerned, I think that portion of that exhibit 13-T does speak for itself. The witness can say whether or not he is familiar with it and knows what it is.

(Testimony of George L. Schmutz.)

Mr. Vitousek: The Court sustains the objection?

The Court: Yes, I think it is technically correct.

By Mr. Vitousek:

Q. I will hand you, Mr. Schmutz, Exhibit 13-T and call your particular attention to a portion of Exhibit 13-T which is marked "Exhibit H," and ask you if you are familiar with the contents of that and if you were at the time you prepared, at the time you arrived at your opinion as to value?

A. I was familiar with it.

Q. Now, I call your attention particularly to the first part of that exhibit, which shows a summary of the lessors and leases, dates of expiration, annual rentals, and general location of the leased areas. Are you familiar with that? A. I am.

Q. And were you at the time you arrived at your opinion as to value? A. I was.

Q. Yesterday, Mr. Schmutz, counsel for the Government asked you questions regarding Exhibit 9-K, being a Damon lease, dated June 27, 1927, and two letters attached. Do you remember those questions? [1472] A. I do.

Q. Now, as I recall, one of the questions was based on a statement that this lease, 900 acres, of Damon land—do you know whether or not Damon land had been taken in previous takings?

A. I understand that there had been some of the land taken previously, which is included in that lease.

Q. Is included in the descriptions?

(Testimony of George L. Schmutz.)

A. Included in the descriptions of the lease.

Mr. Rathbun: Well, I object to that. I don't know what "previously" means.

By Mr. Vitousek:

Q. Well, what do you mean by "previously?"

A. Prior to the takings involved in this consolidated action.

Q. I ask you whether or not in your answer to that question—I'll withdraw that. As I understood, you said that there were some 1087 acres that you considered having been taken in this particular consolidated trial? A. That is correct.

Q. Now, assuming that the area of cane land taken in this particular—I'll withdraw that. Assuming that the area of cane land involved in the Damon Estate holdings which were taken in these particular proceedings was 595.01 acres, and assuming that this lease assumed by the Government was not [1473] involved, was not valid, would that make any difference in your answer?

A. It would have.

Q. Well, what would the difference be?

A. My opinion of the value before and my opinion of the value after would have been reduced approximately \$595,000.

Q. Mr. Schmutz, you were asked yesterday concerning some compliance payments. In connection with these compliance payments, do you know whether or not the Government considered them income for the purpose of Federal taxation?

A. I am informed that it is taxable income.

(Testimony of George L. Schmutz.)

Q. Now, in connection with this exhibit for identification, and particularly to table 1——

The Court: What is the number on that?

The Clerk: A for identification.

Q. ——Government Exhibit A for identification, particularly to table 1 forming a part of that——

The Clerk: Excuse me, it's 1 for identification.

Q. I'll withdraw the question. I refer you to Government's 1 for identification, particularly table 1 of that exhibit for identification, and on table 1, particularly column 6, which is headed "Net Income Available for Interest on Investment," as I understood your testimony—if not, will you please correct me?—if in your opinion the figures there shown are incorrect? [1474]

A. That was my testimony.

Q. Yes? A. Yes, sir.

Q. And in your opinion would they be more or less?

Mr. Rathbun: Just a moment, please. My question was directed to that document, not to any ideas that this man may have had about a different method of bookkeeping. This is the bookkeeping done by this company and that's what I examined him on. This man is in no position to revalue their books or change their method. I didn't have any such question.

Mr. Vitousek: Counsel endeavored yesterday to show that these exhibits were made by this particular individual, and he based his questions on this exhibit which the individual said repeatedly yesterday in regard to particular figures, not the

(Testimony of George L. Schmutz.)

columns as a whole, but that they were incorrect. Now, we are endeavoring to show they are incorrect as a whole. We never said that he based his opinion on this figure. But I don't know the purpose of bringing this in. Certainly they cannot bring it into the record and then foreclose us from showing it is incorrect. This witness is the one we are concerned with.

The Court: May we have the last question, Mr. Reporter?

(The reporter read the last question.)

The Court: It seems to me he may be able to explain why in his opinion the figures are incorrect, but as to whether or [1475] not the net income available for application to the investment should be more or less is entirely a different question. I think the objection is good. I will not allow that particular question but I will allow him to explain or give his reasons as to why he believes those figures are incorrect.

Mr. Driver: Your Honor, may I say something on that? This witness used these figures in an effort to justify his position in the Congressional claim. Certainly he can't be permitted to impeach himself, if that's what Mr. Vitousek is after. He is now being asked whether the figures he relied on are incorrect.

Mr. Vitousek: Now, if the Court please, we might as well get this matter straight. The witness is being examined here in regard to a question before this Court, which is different from the ques-

(Testimony of George L. Schmutz.)

tion before Congress. This witness made certain sheets in this report, and we propose to show that he didn't make certain—as I understood the examination yesterday did not go to the extent of showing that he relied on these figures but endeavored to leave the inference that he did, although he repeatedly stated he didn't. We are entitled on redirect to clear that up. We are not impeaching this witness before this Court. This matter was submitted to Congress, but we don't know whether this book was submitted to Congress because it's not been shown yet that it was. And I am prepared to show that certain of these sheets were changed before submitted. This witness was employed, as he stated, to assist [1476] in preparing it, but he wasn't the final authority. Now, when they are examining him on this in a trial before this Court, not Congress, he is entitled to show what he actually considered when he placed his opinion of value on this property.

Mr. Rathbun: And our point is that he placed an opinion of value on this property on a different basis than he did there, of course, but it goes to credibility. He made a different statement at a different time. Whether they filed it or wheher they never filed it, he admitted that he knew about it and he knew that his part in it was to prepare it and assist in its preparation for the purpose of being filed. We don't care if they never filed it. It goes to credibility.

Mr. Vitousek: That's our very point. It goes

(Testimony of George L. Schmutz.)

to credibility. If it goes to credibility on redirect, we can have the witness explain it.

The Court: I have already ruled that he may explain as to why in his opinion these figures are incorrect.

By Mr. Vitousek:

Q. Will you explain why in your opinion the figures shown in this column underneath income available for interest on investment, on table 1 of Government Exhibit 1 for identification, are incorrect?

A. I thought that I had explained that rather carefully yesterday. As regards the year 1943, there was transferred [1477] to surplus the bottom line figure for 1943, the figure \$190,302.78. That was after there had been deducted farther up in the sheet the amount of \$189,305.92 for depreciation, and the further amount of \$44,210.62 for amortization of the capitalized value of leases which had been set up on the books. In addition to that, in the statement there is also shown some other pluses, that is, income and expenses which, while truthfully received, are truly spent on an accrual basis, were not necessarily reflective of the average earnings of this property. One of those was loss on equipment discarded, of \$3,555.65; second was damage to growing crops, \$440.40; the third was the sale of labor and supplies to others in the amount of \$14,706.68; another was liquidated damage to fields, \$2,550 even; another was the sale of second-hand bags, \$7,467.86; another was profit on the

(Testimony of George L. Schmutz.)

service station, of \$2,021.23; another was crop loss on land which was reclaimed by the Navy, \$3,815.19; another was loss on crops because of fields converted, of \$662.81. Now, it is my position that while those books are correct from the standpoint of bookkeeping, yet they do not reasonably reflect the average value of the property for purposes of valuation because of the presence of non-recurring items. And when an appraiser makes an appraisal of a property or when he investigates an operating statement, invariably it becomes necessary to reconstruct the operating statement to get his income and expenses on what might be considered a long-term [1478] basis instead of taking care of the fluctuations year by year, or to eliminate the unusual features which are present.

For that reason I say that this document here, this column, does not truly reflect what might be called the reasonable income from operations.

Q. Now, Mr. Schmutz, were you able to secure from these annual reports the information to make this reconstruction of the figures as you used in your appraisal? A. I did.

Q. So every items compares in these reports?

A. Every item affecting that column is found in the annual reports of the company marked Exhibit 13.

Q. And, Mr. Schmultz, assuming a willing purchaser of this property, willing to purchase it, pay cash for it, was examining the property for that purpose, had examined these reports, could he ar-

(Testimony of George L. Schmutz.)

rive, did the reports contain information enough to permit him to reconstruct any figures he wants according to his opinion to reflect the value?

Mr. Rathbun: I object to that as argumentative entirely. He can read the reports and call the conclusion himself.

The Court: I think that is right.

Mr. Vitousek: If the Court please, whether this is argumentative or not, I don't believe it is, but yesterday we spent a whole day here trying to show that the public had been fooled by these reports. It is quite true that the Court could [1479] go through these reports. On the other hand, this is a witness who is called as an expert to testify in regard to fair value. He has a right to testify as to what information was available, what information was available from these reports to anyone making a similar investigation. In other words, there is nothing hidden; it was all on the up and up. The matter of opinion as to how the items should be construed, whether they are non-recurring items of income, should be considered in trying to arrive at what is a stable income. Those are all matters for the man making the value to consider. But that they did all appear in the reports is the question we are entitled to have answered in view of the cross-examination.

The Court: Well, it's already been answered that those reports being public are available to anyone, so that any buyer would have access to them and can do such figuring on the basis of these reports as he saw fit to do. I think that is obvious.

(Testimony of George L. Schmutz.)

Mr. Vitousek: Well, then, that is sufficient, if the Court please. That's what we are trying to show, that all these figures can be found in the report. Now, they can put them around any way they want to, according to the opinion of a particular individual. They are all here.

The Court: All these figures are?

Mr. Vitousek: These figures being the figures that we referred to of income, whether non-recurring or otherwise, the [1480] witness has just testified to.

The Court: In his last answer?

Mr. Vitousek: In his last answer. (To the witness): Your last answer related to what year when you were giving the differences in your opinion?

The Witness: That particular set of differences that I referred to was the year 1943.

The Court: Is it true of all of the years?

Q. State whether or not that would be true of all other years involved?

Mr. Rathbun: Well, I make the same objection.

The Court: Same ruling.

Mr. Rathbun: It hasn't been answered yet.

Mr. Vitousek: Well, we can take it through year by year, if the Court please. But I would like to ask a question to save time, to show that all the other reports would show, could be used for the same purpose.

Mr. Rathbun: And they speak for themselves.

By Mr. Vitousek:

Q. What year did you talk about?

(Testimony of George L. Schmutz.)

A. 1943.

Q. Well, we'll take it year by year. Commence with the first.

Mr. Rathbun: What was the question, please?

Mr. Vitousek: There's going to be a question in a minute [1481] if you will just let me ask it.

Mr. Rathbun: I will, but you asked one and it hasn't been answered yet. I'm going to follow it up.

Mr. Vitousek: What is before the Court? I don't know of any question.

Mr. Rathbun: The one that I made the objection to.

The Court: It is withdrawn in view of what you said, and he is going through year by year.

Mr. Rathbun: All right. I didn't hear him withdraw it.

By Mr. Vitousek:

Q. Beginning with the year 1928, Mr. Schmutz, I believe that was where we started. At any rate, we will start there today. Will you refer to the figures under column 6, table 1, of Exhibit 1 for identification of the Government, and I will ask the same question regarding that particular year as was asked regarding the other year you have testified to?

Mr. Rathbun: Now, I object to that. There were several questions asked. He ought to ask a specific question so that we may meet it.

Mr. Vitousek: If the Court please, I will ask the reporter to go back and read that particular question. I want to frame it exactly the same.

(Testimony of George L. Schmutz.)

(The reporter read the previous question referred to.)

Mr. Vitousek: What I was going to ask was leave of the Court to withdraw this witness for a moment and put Mr. Austin on. Do you remember, he was still on redirect? I had one [1482] more question, and he is in the courtroom and he is busy and——

The Court: Wasn't he to be recalled on these annual reports?

Mr. Vitousek: In connection with this tonnage, if the Court please, to straighten it out. I think one question can answer the whole thing.

The Court: All right, you may.

Mr. Rathbun: If your Honor please, I want to object to that. This is a different sort of a witness. This is an expert. Mr. Austin is mere detail what he was testifying to.

Mr. Vitousek: I'm not going to ask——

Mr. Rathbun: I know but I object to withdrawing him at this time.

Mr. Vitousek: All right. If the Court please, would it be permissible for me to excuse Mr. Austin and telephone him to come up? He has an important meeting at ten o'clock.

The Court: You may.

Mr. Vitousek: Mr. Austin, you can be excused. We will telephone you when you are needed. Counsel objects to you going on now.

Mr. Rathbun: Counsel doesn't object to his go-

(Testimony of George L. Schmutz.)

ing on at all. He objects to interrupting the examination of this witness.

The Court: Proceed.

By Mr. Vitousek:

Q. What in your opinion, Mr. Schmutz, or will you give [1483] an explanation of what in your opinion the changes should be in the column I referred to, column 6 of table 1, Government Exhibit 1 for identification, for the year 1928 and subsequent years?

Mr. Rathbun: I object to that for the reason that he was examining him upon that document as it is. That was made up by the Honolulu Plantation Company. The questions that were asked were directed to him. Now, just what purpose this is to be for, it is not redirect in the next place. What purpose there could be in letting this man reconstruct some books, I can't see. It is incompetent, it is immaterial how he might keep books, if that's what he's trying to tell us now.

The Court: This question is a little different than the other one. I have ruled on that one but this question as stated is a little different than the one that related to 1943.

Mr. Rathbun: Just a little.

The Court: I have ruled basically that this man, having testified that the figures in this table 1 of the Congressional claim, Exhibit 1 for identification, were incorrect, that he was entitled to explain why they were incorrect. So I should think the question——

(Testimony of George L. Schmutz.)

Mr. Vitousek (Interposing): Well, if the Court please, we are not trying to vary the Court's question. We will confine it to just that one.

The Court: Why don't you ask him under that ruling why [1484] this particular figure in 1928 in his opinion was incorrect?

Mr. Vitousek: That's what I was going to ask.

Q. Why is this particular figure, referring to the exhibit we have been talking about for identification, for the year 1928, in your opinion incorrect?

Mr. Rathbun: I object to that for the same reason, if your Honor please. He is not saying it is incorrect as set forth. By another method of book-keeping he is going to say that he wouldn't have made it that way.

The Court: We will see. The objection is overruled. You may have an exception to this line.

A. It would be for the same reasons that I mentioned before as regards the year 1943, and that reason goes to all of these years.

Q. By all of these years you mean the years shown?

A. Well, from '28 to '43, both inclusive.

Q. On table 1 of Exhibit 1 for identification of the Government?

A. That is correct.

Q. Yesterday, Mr. Schmutz, you were shown table 9 of Exhibit 1 for identification of the Government. I will show that to you again and ask you if you prepared that table?

(Testimony of George L. Schmutz.)

A. No, this table was prepared for me but I am acquainted with it.

Q. Now, I will turn back to page 3. [1485]

The Court: Of?

Q. Page 3 of the introductory remarks of Exhibit 1 for identification. That was called to your attention yesterday? A. It was.

Q. And particularly it was called to your attention annual capital investments, this following language: "The annual capital investments were as follows: year 1936, \$345,850.33." Do you recall that? A. I do.

Q. "1937, \$484,926.44"? A. I do.

Q. And "1938, \$495,299.00"?

A. That's two hundred dollars, ninety-nine cents.

Q. \$495,200.99? A. That is correct.

Q. Where did you get those figures?

A. From the annual reports of the Honolulu Plantation Company, marked Exhibit 13.

Q. Well, would you look at this exhibit and see if they appear? And if so, in what years? (Handing small book in evidence to the witness.)

A. May I have the question?

(The reporter read the last question.)

The Court: This exhibit being what?

Mr. Vitousek: The annual reports, 13. [1486]

A. I have before me a report for the year 1936, Exhibit 13-M, which carries the title "Permanent Improvements and Property Accounts, December 31, 1936, Exhibit A;" on the bottom portion of that

(Testimony of George L. Schmutz.)

page is shown additions, \$345,850.33, which is the same figure as shown in this claim to Congress marked Exhibit 1, I believe, for identification. In the report, of the annual report of Honolulu Plantation Company for the year 1937, marked Exhibit 13-N, on the page headed "Permanent Improvements and Property Accounts, December 31, 1937, Exhibit A," in the bottom portion of that page is shown additions, \$484,926.44. That is the same figure which is shown on Exhibit 1 marked for identification, as capital expenditures for that year. In the 1938 annual report of Honolulu Plantation Company marked Exhibit 13-O, on the page headed "Permanent Improvements and Property Accounts, December 31, 1938, Exhibit A," near the bottom of that page is shown additions, \$495,200.99. That is the same figure also shown on Exhibit 1 for identification.

Q. Mr. Schmutz, you have testified in your direct examination on a question about making a number of appraisals? A. I have.

Q. I ask if in your experience you have ever come across a practice of putting an amount representing an unliquidated damage claim on the books of the company?

A. I have never seen any such accounting.

Q. And you didn't find it on the books of this company? A. I did not. [1487]

Mr. Driver: You said liquidated?

Mr. Vitousek: Un liquidated.

The Court: Unliquidated.

(Testimony of George L. Schmutz.)

Q. In regard to the use of the meaning of the words used yesterday, I'd like to have explained further what is meant by capital invested?

A. Capital invested——

Mr. Rathbun: I object to that as not proper redirect. It has all been gone over. There is nothing on cross-examination that causes that to be necessary in redirect.

Mr. Vitousek: If the Court please, yesterday counsel used the term "capital invested" as meaning value, and we are entitled on redirect to clear up what that phrase it, the meaning that is in the mind of this witness.

Mr. Driver: He has already testified.

Mr. Vitousek: Am I going to have two counsel against me now?

Mr. Rathbun: He didn't do it until we brought it out in cross. But it is only necessary in connection with these books; that's where the term is used in these exhibits. The Honolulu Plantation defined what they meant by it by the figures they put under it.

The Court: I have a recollection that on cross-examination at one time the witness did give us his definition of what he meant by capital investment.

Mr. Rathbun: I'll give you substantially the words the way he gave it.

The Court: I'm sure I have a note to that effect.

Mr. Rathbun: Capital investment means money, invested in enterprise, is what he said.

Mr. Driver: I have a note on it and it's on

(Testimony of George L. Schmutz.)

direct examination and it follows shortly after his opinion of values in dollars.

The Court: Yes, there is a note here among my papers that on direct examination he defined capital investment as meaning the money put into the business. I seem to think also that on direct examination he distinguished between what was the capital investment and what would be new capital if a buyer purchased it and distinguished between cost and value. I seem also to think he defined the term on cross-examination, although on that point I may be in error.

Mr. Vitousek: If the Court please, it was repeatedly used in cross-examination by examining counsel.

The Court: Well, you simply want him to re-define or enlarge on his definition?

Mr. Vitousek: Let's clear up what was meant in cross-examination yesterday, if the Court please.

The Court: What he meant by it or what the questioner meant by it?

Mr. Vitousek: I don't know what the questioner meant by [1489] it. I want to know what he meant by it in the various answers he gave.

Mr. Rathbun: It's perfectly obvious what he meant by it because every time he was asked it was in connection with these exhibits gotten up by the Honolulu Plantation Company.

The Court: Well, I think your question that is pending is, Please enlarge on your definition of

(Testimony of George L. Schmutz.)

capital investment, or redefine it, something like that. I don't think that question is proper.

Mr. Vitousek: Well, I'll withdraw that question, if the Court please.

Q. In connection with cross-examination yesterday, or certain questions asked you concerning capital investment, what did you mean or have in mind as a definition of capital investment when you answered that?

Mr. Rathbun: I object that it is not proper redirect. The questions that were asked yesterday were directed to exhibits that provoked any—that define capital investment. The Honolulu Plantation defines them. If he is going to vary that, we will get into a field of letting this gentleman write their books and make the construction, contrary to their own documents.

Mr. Vitousek: If the Court please, we are not talking about their own documents or anything else. We are talking about the answers given by this witness. It is very clear what the books of this company show as the capital investment. [1490] And the witness has explained that it was put up as a cost for the year 1932 and depreciated since that date. That's what it shows.

The Court: Your question is directed to having him tell us now what, in answering those questions yesterday, he meant when he used the term "capital investment?"

Mr. Vitousek: That's right.

The Court: The question may be answered, and

(Testimony of George L. Schmutz.)

you may have an exception. Do you have the question in mind?

The Witness: Yes, your Honor.

A. Briefly, the words "capital investment" as applied to these reports, means the amount of money which the Company has invested at whatever date it was invested, less depreciation and plus additions to capital.

Q. Well, coming down to specific instance, suppose, assume for the sake of this question, that I purchased an automobile for five thousand dollars, what would be my capital investment relating it to the definition you termed?

A. Your capital——

Mr. Rathbun: I object to that as having nothing to do with this question in this case whatsoever. We have no such situation. It is not proper redirect.

The Court: Overruled.

Mr. Vitousek: I'll withdraw the question.

Q. Assuming that I purchased the property you value [1491] here at \$3,100,000 plus, what would be my capital investment at the figure you placed on the value?

A. Your capital investment——

Mr. Rathbun: Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper direct and it calls for a conclusion. It sheds no light on the case under the issues.

The Court: You dropped your voice in the last part of that question. I didn't get the last part.

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

The Court: What do you mean by the last part of that question?

Mr. Vitousek: If the Court please, I want him to give an example relating to what his meaning of capital investment is. In other words, he has placed his value on this property after the taking, the exact figures I don't recall but three million one——

The Court: Well, I understand what you are after, but I don't understand the last part of your question. Additionally, on direct examination, as we just reviewed our notes here, we find that the witness has already distinguished between what would be the capital in an object and what would be the capital if a person bought it. I think he has already illustrated it.

Mr. Vitousek: Well, it can change, if the Court please. [1492] That is the purpose of this question. The minute I bought it, that's my capital investment. It may be entirely different from the capital investment of the previous owner.

The Court: That's right. I think he has already explained that.

Mr. Vitousek: If it has been explained——

The Court: If that is what you are asking him, I don't think your question is directed to it. I think as stated the objection to that question is good. But I think if you reframe it you might improve the situation, although I still think it has been asked and answered on direct.

Mr. Vitousek: If the Court please, I'll with-

(Testimony of George L. Schmutz.)

draw that question at this time, and I'll go over the notes during recess.

The Court: All right. As a matter of fact, we are about scheduled by the clock for our first recess, so it might be well for you to go over your notes and we'll clear it up.

(A short recess was taken at 10:00 a.m.)

After Recess

Mr. Vitousek: If the Court please, in connection with that question of capital investment, I find that was answered before.

Q. Mr. Schmutz, yesterday, in response to a question of cross-examination, as I understood you to say, you considered this plantation had normal management? A. I did. [1493]

Q. Now, how did that enter into your consideration?

Mr. Rathbun: I object to that as not proper redirect. That's a proper question on direct; no occasion for asking it on redirect.

Mr. Vitousek: On redirect you can ask any question brought out the first time on cross. I don't understand the Government in this case. I always understood we were trying to get out a full picture of full facts. Now every technical objection that can be raised is being raised here. But it is the proper redirect. It was brought out on cross-examination the first time about management. We are entitled to find out what he meant by his answers,

(Testimony of George L. Schmutz.)

if the Court please. We are trying to get this matter before the Court in a clear manner so the Court can rule on it, having everything in mind.

Mr. Rathbun: That's a usual reply when they haven't got any real reason to say that you should let everything in. That doesn't answer my objection. It's perfectly orderly rule of court that you can't answer questions on redirect which should have been asked on direct. And that is not technical. The courts made that technical if it is. I didn't.

The Court: On the other hand, it is true that this issue of management was brought out as a matter on cross-examination, was it not?

Mr. Rathbun: It was the reasons that he gave for his opinion in his direct examination. That's why. One of them. [1494] He considered it a successful company, a successful operation.

Mr. Vitousek: That's quite true, but nothing was said about management.

Mr. Rathbun: Well, that goes with it, doesn't it?

Mr. Vitousek: That's your argument. Don't argue with me. Talk to the Court.

Mr. Rathbun: I'm not arguing with you. I wouldn't waste my time. There's no——

The Court: Just a minute.

Mr. Rathbun: There's no occasion for his remark.

The Court: Well, he was talking to the Court, and there is no need for you to answer.

Mr. Rathbun: Well, I'm talking to the Court.

(Testimony of George L. Schmutz.)

The Court: That strikes me as correct, that in his direct examination he talked about assuming successful management.

Mr. Vitousek: It was my recollection, if the Court please, that he said that there had been a successful and reasonably profitable enterprise, but nothing was talked about management on his direct.

The Court: Well, just a moment. We'll review it. My notes show that that first issue of management arose on cross-examination, and therefore I will allow the question. You may have an exception.

A. I don't know how to answer the question, Mr. Vitousek. I assume that there was a normal management. How that influenced [1495] me, I can't say.

Q. Did you assign any dollars and cents in your valuation to that fact? A. No, I did not.

Q. Did you assign any dollar and cents figures in your valuation to the other matter we have discussed?

Mr. Rathbun: I object to that as not proper redirect, if the Court please.

The Court: Will you wait until he finishes?

Mr. Rathbun: Well, I can't tell.

The Court: Keep your voice up and restate your question.

Q. Did you assign any dollars and cents figure to the other question that was asked you, or another question that was asked you in regard to the

(Testimony of George L. Schmutz.)

expensiveness of conducting the sugar plantation here involved after the takings involved in this suit?

Mr. Rathbun: I object to that as not proper redirect examination.

The Court: Overruled.

A. No, I did not.

Mr. Vitousek: That's all, if the Court please.

The Court: Any further questions?

Recross-Examination

By Mr. Rathbun:

Q. Mr. Schmutz, as I heard your testimony, you testified [1496] in substance among the things that you considered in arriving at this opinion prior to these takes, Honolulu Plantation Company was an integrated enterprise, grew cane and made sugar, engaged in a perfected synchronization of an agricultural and industrial productive activity. Did you make that answer in substance?

Mr. Vitousek: If the Court please, we object to this as not proper recross. There is nothing on redirect that was gone into in this particular point. It was asked on direct examination and should have been the subject of cross yesterday.

Mr. Rathbun: I'm asking it now because the Court overruled my objection. It is now in on redirect.

The Court: I don't understand your last statement.

Mr. Rathbun: My last statement is that I objected to it because it was not proper redirect and

(Testimony of George L. Schmutz.)

the Court let it in, that he didn't assign any dollars and cents value to that. Now I have a right to pursue that.

The Court: I hear you but I don't relate it to your question.

Mr. Rathbun: Well, my question is going to go through all of these items and see what he did assign dollars and cents value to. The first time he said that.

The Court: You are calling to his attention this particular statement that he made on direct?

Mr. Rathbun: I'm telling the Court that's my purpose. [1497]

The Court: In other words, this is just a foundation question?

Mr. Rathbun: Well, it's very much more than foundation, if your Honor please. It goes to the fact that he testified to on redirect examination for the first time.

Mr. Vitousek: If the Court please,—

Mr. Rathbun: He assigned no dollars and cents value he said.

Mr. Vitousek: If I may be permitted to answer that this witness throughout his whole examination has never assigned a dollars and cents value on direct. When we asked him those questions he said he considered all these things. It comes right within the decisions what an expert can consider. On cross-examination there were two, perhaps three particular matters brought out, two that had not been discussed in detail on direct. One was in re-

(Testimony of George L. Schmutz.)

gard to management and the other was in regard to these increased costs, reading from this so-called claim. Now, those two items were new on cross. All the others had been discussed. They had been discussed on direct. On redirect we asked no questions of that kind except in connection with the two items. Nor is what counsel was asking was with regard to statements in this book, in this so-called Exhibit for identification. I mean counsel for the Government. He read various statements and said one of them would show a question of increased cost, if the Court please. There was a [1498] statement on that. Then he asked the witness if he considered it. I never asked any such questions on direct. And the witness answered Yes.

Now, I asked did he assign any dollars and cents value to it. That was the purpose of the question on redirect. It was the question. It was brought out on cross for the first time.

The Court: Well, this is clear, that this recross examination is limited to the matters brought out on redirect. We can all agree on that.

Mr. Vitousek: Right.

The Court: The question that Mr. Rathbun asked confuses me for the reason that it relates directly to one of the first answers this witness gave on direct examination, and that's why I am asking him if he is using it as a foundation question to get directly to the matter brought out on redirect examination. If he is, I will allow the

(Testimony of George L. Schmutz.)

question. But if it is going back into a field that should have been covered by cross-examination originally, the answer of course is no. With the understanding that this will lead up to matters brought up directly on direct examination, the question will be allowed.

Mr. Rathbun: Yes, your Honor. May I have the last question?

(The reporter read the last question.)

A. I did. [1499]

Q. Did you give any dollars and cents value in your opinion in this case to that item?

Mr. Vitousek: Now, if the Court please, we object that it is not proper recross. It was not brought up on redirect at all.

Mr. Rathbun: The last question he was asked, the answer that he gave, that no dollars and cents value—I mean, he gave something no dollars and cents value. Now, by process of elimination I am going to try to find out what he did give the dollars and cents value to. I have to eliminate that to do that.

Mr. Vitousek: Well, we go back all over on recross. I don't know—it's up to the Court to decide.

The Court: Let's stop these side remarks. They don't help at all.

Mr. Vitousek: Under counsel's statement we are going back on recross over everything that happened on direct. Now, that is not proper recross. What he can go back over is what we brought out on redirect, matters that he brought out on

(Testimony of George L. Schmutz.)

cross, which were new matters. And that's what we confine ourselves to.

Mr. Rathbun: The new matter, if your Honor please, is perfectly obvious. They have taken on direct examination—he is being presumed to have given all the reasons of his valuation and how he arrived at it. Now, I objected to that as not re-direct, but he was allowed to answer, and that is not [1500] critical at all—

The Court: Go ahead.

Mr. Rathbun: And he brought in an element of a reason for his valuation, and one of the things that he did not do was that he did not give any dollars and cents values to the item of normal management.

The Court: Right.

Mr. Rathbun: That's the first time he testified to that. Not a word on direct examination like that.

The Court: Well, you can cross-examine him on that point and the other point that was made that is similar to that, but your question here relates again to one of the very first answers he gave; and your question is now, did you give any dollars and cents value to that?

Mr. Rathbun: Yes. Now going to credibility, having answered that for the first time.

The Court: What would he mean by that, in your question?

Mr. Rathbun: Why that is the thing that he said, normal management.

(Testimony of George L. Schmutz.)

The Court: If that is your question, I will allow it.

Mr. Rathbun: Well, that is his answer to the question, your Honor. I am not limited by his answer. That gives rise to what he did give dollars and cents value to now. He never said in his direct that he gave dollars and cents value to anything. Now he is telling what he didn't give dollars and cents value to. And I am going to ask him the things that he [1501] considered. I am going to try to name them as he gave them. He detailed them in the direct examination. And I'm going to see which ones among those he did give dollars and cents value to. He never said anything about giving dollars and cents value to them in direct examination.

The Court: May I have that last question again?

(The reporter read the last question.)

The Court: If you will describe what you mean by that item, I could see the question.

Mr. Rathbun: I read what he stated. The previous question. I asked him if that is in substance what he stated.

The Court: He said he did.

Mr. Rathbun: Yes.

The Court: Well, that certainly relates to the matter brought out on direct, not on redirect.

Mr. Rathbun: Why, of course it does. That question relates to it without any question. But I am looking it up for the purpose of eliminating

(Testimony of George L. Schmutz.)

now. I have to tell him in front of him what I am up to now, by what he said in his conclusions now as to the reasons for his opinion in this case. He gave a reason that he never gave before. That got down to dollars and cents values, which he resisted pinning himself down to on direct and cross-examination, both. He said he didn't consider any one of these things separately. They were all considered together. There wasn't any dollars and cents value [1502] given, or not given, testified to, by him before.

The Court: I'm not sure I follow you, but on the understanding that you are going to tie it up with his redirect, I will allow your question.

Mr. Rathbun: Well, that's my purpose.

The Court: You may have an exception.

By Mr. Rathbun:

Q. Do you remember the question?

A. Yes. The answer is that I did not assign any dollars and cents value to that item.

Q. All right. You said that the dividends distributed to the shareholders back in '98, and specially to the year '24, was one of the things you considered, did you not?

A. Yes, I did say that.

Q. Did you give that item any dollars and cents value in forming this opinion?

A. No, I did not.

Q. You said you considered the earnings of the property in substance, did you not? A. I did.

Q. Gave that consideration, in other words?

(Testimony of George L. Schmutz.)

A. I did.

Q. Did you give any dollars and cents, did you give that item dollars and cents valuation in your opinion?

A. I did not. [1503]

Q. You took into consideration, you testified, the book value of this company, the property of this company, did you not?

A. I did.

Q. Did you give that item any dollars and cents value in arriving at your opinion?

A. I did not.

Q. You stated in your examination that you gave consideration to the history of this company and what went on before, did you not?

A. I did.

Q. Did you give that item any dollars and cents value in your opinion?

A. I did not.

Q. In 1936 the company renewed or extended most of its major leases to 1965 and in one light became a new enterprise. Did you testify to that in substance?

A. I did.

Q. And did you give any specific dollars and cents value to that item in arriving at your opinion?

A. I did not.

Q. You also stated that you took into consideration the amount of money spent by the company in additional capital improvement and betterments in three years following the new leases, did you not? [1504]

Mr. Vitousek: If the Court please, that's been asked and answered even on recross.

(Testimony of George L. Schmutz.)

Mr. Rathbun: It hasn't been answered in connection with this question.

Mr. Vitousek: May I have that question?

(The reporter read the last question.)

A. I did.

The Court: Wait a minute.

Mr. Vitousek: If the Court please, I still maintain the objection that it is not proper recross. In order to save time I'll withdraw that.

The Court: You may have a continuing exception to this line.

Q. Did you give any dollars and cents value to that item in arriving at your opinion?

A. I did not.

Q. You testified in substance that in June of 1939 there commenced a series of takings in which cane lands were lost to the United States and others, and that those losses continued up to the first of the consolidated cases here, including lands in these 13 cases. Did you testify that way on direct? In substance.

Mr. Vitousek: We submit that he should know what these 13 cases referred to.

Mr. Rathbun: He testified to that. [1505]

Mr. Vitousek: You're asking the question. Now, does he mean these 13 cases before the Court? I think we are entitled to know that.

The Court: I assume that.

Mr. Vitousek: That can't be assumed because there have been a lot of consolidated cases in this.

The Court: Oh, I think it is very apparent that

(Testimony of George L. Schmutz.)

there is only one group of 13 cases that we have ever referred to in this proceeding and these are the cases now on trial.

Mr. Rathbun: And further, I am taking his testimony; he gave that testimony.

The Court: Well, you are not quoting him verbatim?

Mr. Rathbun: In substance.

The Court: You don't know positively that he talked in terms of 13 cases, do you?

Mr. Rathbun: That's what he said.

The Court: Are you sure of it?

Mr. Rathbun: I am sure that he said 13 cases.

Mr. Driver: So am I. I wrote it down.

Mr. Rathbun: I'm sure that he did. I've got that note myself.

Mr. Vitousek: If the Court please, I would prefer, if there is any question, to take the record. I have no such recollection that he didn't consider these takings. That's what he is reading in this case. I don't believe he ever made [1506] such a statement. The whole purpose of the trial here is these 13 cases.

The Court: Just a minute. Mr. Witness, did you know what they meant in that last question by the phrase "13 cases?"

The Witness: I assumed it to be the consolidated cases at issue here now.

The Court: On the assumption that that is what is meant here now, can you answer the question? Don't answer it, but can you? Do you understand it well enough to answer?

(Testimony of George L. Schmutz.)

The Witness: Well, the question is—

The Court: I don't want you to answer it, but with that phrase are you able to answer? Do you understand the question?

The Witness: Well, the question was, did I make such a statement, as I understand it?

The Court: Read the question.

(The reporter read the question referred to.)

The Court: Do you understand the meaning of the phrase "13 cases?" Do you understand that phrase as used in that question?

The Witness: I do.

The Court: And with the understanding that that relates to these cases now on trial, can you answer the question?

The Witness: Yes, I did make such a statement in substance.

Q. Pardon me?

A. I say in substance I made such a statement.

Q. Well, that is substantially the way you stated it? A. That's right.

Q. That is true of all of them that I have asked you about, isn't it? A. I think it is.

Q. Substantially is the way you stated it, the way I gave you the question?

Mr. Vitousek: We think it is improper cross-examination. I don't know if he's been quoting him before. I think we ought to confine it to specific questions.

The Court: I didn't hear what he said.

(The reporter read the last question.)

(Testimony of George L. Schmutz.)

Mr. Vitousek: The point is there that this is a general question in all that is stated. Now, he hasn't been asking about opinions altogether. It's not tied up to anything particular. It goes to the whole testimony.

The Court: It's very apparent that in this line of questioning Mr. Rathbun has been consulting some notes and asking the witness to agree or disagree with him, whether in substance on prior testimony he testified substantially this way. I think it is clear that it relates to that. It seems to me we are losing an awful lot of time over minor details. Proceed.

Q. Now, did you give any dollars and cents valuation to that item in your opinion of value?

A. I did not. [1508]

Q. That following these takings in 1939 the company was able to make replacement of cane at higher elevation, did you testify to that in substance? A. I did.

Q. Did you give that any dollars and cents valuation in your opinion of values?

A. I did not.

Q. Now, pertaining to Exhibit 1 for identification, Government's Exhibit 1 for identification, table 1, you were asked on redirect in column 6, net income available for interest by investment, stated, you said the figures there were incorrect and then you illustrated by stating that it is shown on the reports, annual reports, that in 1943 there was transferred as to surplus one hundred ninety odd

(Testimony of George L. Schmutz.)

thousand dollars, and so on. You remember that what I am talking about? A. I do.

Q. Now, those depreciations, and so forth, the company got money value for those, did it not, through income tax deductions?

Mr. Vitousek: If the Court please, we submit that that question is not intelligible, the company got money value for those depreciations. We object to the question.

The Court: That isn't all of the question. The question is, Did not the company get money value for those depreciations through income tax deductions? [1509]

Mr. Rathbun: That's right.

Mr. Vitousek: We submit still, if the Court please, money value through income tax deductions is not very—

The Court: The witness may answer the question if he understands it.

The Witness: I don't understand it.

Q. You don't understand it? They could take losses, can't they, on income tax up to a certain point?

A. If there is a loss, the company can take a loss and show a loss.

Q. Supposing they depreciate a piece of property to two percent, and the amount amounts to a hundred thousand dollars that year, is that a deduction that they can take under their income tax?

A. Depreciation is a deduction.

Q. Yes, that's what I asked you, wasn't it?

(Testimony of George L. Schmutz.)

A. Yes, sir.

Q. All right. To that extent they get value for it, don't they, in the lesser income tax they pay?

A. Well, the greater the amount of depreciation, the greater the amount of the deduction for income tax, that is true.

Q. And by the same rate it reduces the tax, doesn't it, by the same method, to the extent of the depreciated item?

A. Yes, there is a difference there. That is true. [1510]

Q. Now, you remember what I asked you about yesterday when I called your attention to those years in which you set forth—1936, 1937, 1938—the additional invested capital, don't you?

A. I do.

Q. You also remember that I called your attention to a recapitulation of invested capital year by year, don't you?

A. I do.

Q. And I called your attention to the fact that the amounts year by year on that recapitulation of invested capital did not add up each year to the amount of those three years as you gave the additional invested capital, didn't I?

A. By that you mean that the increase in the capital over the three-year period was less than the amount of new capital put into the enterprise?

Q. The new capital that you said had been put into the enterprise.

A. That is correct.

Q. And that's what I asked you about, wasn't it, that recapped invested capital year by year?

(Testimony of George L. Schmutz.)

And I had it in front of you and showed you the item, didn't I? A. I recall that.

Q. That's right, isn't it?

A. What is right?

Q. What I just asked you, that that's what I directed [1511] your attention to it.

A. You did direct my attention to it, yes, sir.

Q. Now, you say that you never knew of unliquidated damages for the loss of land, is that what you meant to say, stated as a claim or on books of the company, is that what you meant to say?

A. That's what I meant to say, that a claim that had been uncertain, that was unliquidated, uncertain as to the amount and the probability of collection, I have never seen any books which showed any definite amount for them for that.

Q. Suppose a company obtained some leases of some land and they fixed the value of those leases in their opinion definitely, they put it on their books, they'd put it on their books, wouldn't they?

A. They would.

Q. And when they lost it, the land, they'd take it off their books, wouldn't they?

A. I should think they would.

Q. Yes. Now, Mr. Schmutz, did you ever see these annual reports that are in evidence here that you have now been testifying about before you formulated your opinion of value in this case?

A. I did.

Q. And you examined them, did you?

A. I did. [1512]

(Testimony of George L. Schmutz.)

Q. When did you do it and where?

A. In San Francisco in 1944.

Q. Where did you get them in San Francisco?

A. The office of the Honolulu Plantation Company.

Q. You went back last night and went over some figures that had been referred to in your cross-examination and made some new computations, didn't you? A. I did not.

Q. You did not?

Mr. Rathbun: I think that's all.

The Court: Any further questions?

Mr. Vitousek: If the Court please, just a moment. That's all, if the Court please.

The Court: The witness is excused.

(Witness excused.) [1513]

Mr. Vitousek: If the Court please, I at this time ask the Court that this matter be recessed until December 20th. We have learned definitely that Mr. Spalding will be back; he is leaving on the boat this Friday and is scheduled to be here on the 19th. Mr. Austin, whom I'd like to recall, will only take one minute. The purpose of that is to have him get in the record the paper he was talking from, from his black book, on which there seems to be a lot of variance on the ideas he read. I want to get that particular sheet in the record. The other witness we had here all day yesterday is one of the Government officials who said he had very urgent Government business today, Mr. Crozier; and we would like to have it go over to the

20th so we would have those three matters then. If the Court wants Mr. Austin, we can send for him. It will only take a minute. But I thought we could take it all up at that time.

The Court: So that you have two more witnesses, one a recall?

Mr. Vitousek: Three, one recall and two.

The Court: Two new witnesses, Mr. Crozier and—

Mr. Vitousek: And Mr. Spalding.

The Court: Well, I appreciate that perhaps one of your witnesses has important business to attend to, but I don't see why we have to wait.

Mr. Vitousek: If the Court please, we could, but they [1514] are having a great controversy over value, his successors, as to the value of certain property in the country district, and he had a hearing today and he had to attend to it.

The Court: Well, by agreement of counsel to have a recess until the 20th—

Mr. Vitousek: I mentioned that particular witness to the Government counsel yesterday, and he said he had this engagement, and I understand they said it would be satisfactory to them. I could call Mr. Austin now, but it is such a small matter.

The Court: Well, it wouldn't help us very much. Mr. Rathbun?

Mr. Rathbun: Just a moment, if your Honor please.

The Court: What is your reaction to this request that we continue?

Mr. Rathbun: It's entirely immaterial to us.

Whatever will accommodate them, I am willing to do as far as their time is concerned. I have nothing else to do but Government cases.

The Court: Mr. Spalding will be available as a witness on the 20th?

Mr. Vitousek: Yes. After our discussion in your Honor's chambers we wired him and had a cable back that he expected to leave on Friday, which will bring him here the 19th.

The Court: Well, would there be any advantage to starting a day or so ahead of the 20th and taking Mr. Crozier's testimony? [1515] How long will that take?

Mr. Vitousek: Well, I don't imagine it will take a full day. We can do that, if it's all right.

The Court: We can do that on the 19th.

Mr. Vitousek: The 19th.

The Court: How does that strike you?

Mr. Rathbun: Yes, it's all right, your Honor.

The Court: All right.

Mr. Vitousek: And have Mr. Austin then.

The Court: All right, we'll recess this case until the 19th.

Mr. Rathbun: Just a moment, your Honor. I have a motion that I want to make. He started on this before I had a chance to do it. We move now to strike the testimony of Mr. Schmutz for all of the reasons which we gave in our objection to the question when he was asked to give his opinion of value, and in addition thereto for the additional reasons that he has taken into consideration, as shown by his complete testimony now—having been

cross-examined—what the record shows without question to be a business damage, non-compensable in a condemnation suit. It shows that he has taken into consideration, in arriving at his opinion of value, improper elements under the law, such as profit, dividends paid, losses, and so forth. It appears also that he has taken into consideration a lease as being in existence, namely, the Damon lease, which we say [1516] has expired, and the record at this time shows it on its face that it has, and had before the time of these takings.

Mr. Vitousek: If the Court please, there is no such evidence in this case as stated, that this has expired. We are prepared to argue that lease as under the laws of the Territory it is in existence, not necessarily as the continuation of the old lease but a new lease from that time on of land described in the new documents, the new documents consisting of the letter of offer and the definite, unconditional acceptance, which under the laws of the Territory constitute a lease. The parties entered into possession, made improvements, it's been testified to here. Under all the authorities of the Territory that does constitute a document, constitute a definite lease. That this witness might describe it as a renewal is immaterial for the purpose of his testimony as to whether it was a renewal of an old lease or a new lease of the land for the term of ten years commencing with the expiration of the old. He is not a lawyer. The material point was that he considered this for the purpose of his testimony; he said a lease to 1953, 9-K I believe it is. And that's just what it is. It is immaterial for the

purpose of the Court whether it is an extension of an old lease or a new lease; what it is is a definite offer made by the trustees and signed by them of land comprising fields now in cane mauka of the Kamehameha highway, makai of the highway, 92 to 94, and the lease of [1517] fields 91, 107, not to be renewed, 97-A and 97-B of gore lot B, surrendered. Now, that takes out of the lease certain areas but leaves in others, and the others that are left in, as shown by the map, are involved in these takings.

That is a definite offer of rental specified, terms specified, land specified, and is an unconditional acceptance in writing back by the attorney-in-fact to the trustees of this area, the lease to commence, ten years as the term, for a period commencing January 1, 1944, terminating December 31, 1953. And that's exactly the terms shown on all these exhibits including the last one offered in evidence, if the Court please. That's Exhibit 13-T, which shows the Damon Estate, Moanalua, December 31, 1953, shown on all other exhibits in this case

Now, if the Court please, I refer the Court to—and it is to be remembered that this particular question is to be decided by local law—the question as to what, under the decisions of law in the Territory of Hawaii, is the law of the Territory of Hawaii regarding leases. I refer the Court to *Wong Kwai against Dominis*, 13 Hawaiian, 471. I am reading from the case.

“The fact that a formal lease was contemplated did not prevent the letter and the acceptance of its terms from constituting a final binding contract,

the preparing and signing of the lease being merely in execution of the contract.”

And that is our position here. While it may have been contemplated, as the letters indicate, if these terms are [1518] agreeable, a formal lease can then be drawn up, and this is a definite acceptance back showing that they are agreeable. And in this connection, if the Court please, I call the Court's attention to the fact that we did have evidence directly in the record by Mr. Austin, that after this improvements were made on these lands and they have been in possession of them. However, before the Court rules on the validity of this document, we should be entitled to have the evidence of Mr. Spalding, because under the laws, the decisions of the Court in this Territory, where an offer is made, accepted, even though it may be without the statute—it may be under the statute of frauds—if the parties enter into possession and act upon it to their detriment, then it does become a binding lease. We are entitled to show evidence not only as to the documents, which in my opinion do constitute a definite agreement, but we are also entitled to show that the parties entered into the land acting on this with full knowledge of the lessors, acting upon this offer of acceptance and made improvements and paid rent, and so on, which would certainly prevent anyone from raising the statute of frauds in bar of such lease. In other words, the evidence in that regard is not complete.

The other point, if the Court please, in the recess this morning it was definitely fixed that the witness as an expert did not say because of this

factor I make a computation and fix a dollars and cents value. No. He did just what the [1519] decisions all say an expert should do; that is, he takes into consideration various items which the courts have said a man can consider. He did, however, definitely state, both on cross and direct, that he did not consider any so-called business losses, loss of business. And it was explained yesterday, as the Court will recall, on cross-examination. He did state that he considered it profitable, as I understand it, but there was no sitting down with a pencil and capitalizing the profit to arrive at the value. He considered the items that anyone who was a prospective purchaser would have considered. He took the records of the company, as shown by its financial statements and annual reports. He took into consideration the fact that the areas for uses, cane lands, were depleted. All these matters he took into consideration. But he did not establish a dollars and cents value.

I call the Court's attention to the case of the United States against 3,969.59 acres of land. 65 Federal Supplement, 831, reading from page 838:

“Opinion testimony as to the market value may be given by expert witnesses. The opinion of such witnesses is admitted in evidence in cases where the value of property such as owned by the defendant in this case involved here is an issue. It is admissible when the witness is one who has sufficient knowledge concerning the matter, acquiring by study, training and observation or experience to permit him to give his opinion. [1520] However, where the testimony of such witness is as to any-

thing that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experience he may have as to any bearing it may have on any increased accuracy on his part over that of a person of ordinary experience. The jury is not bound by any opinion testimony, and it should be and is to be considered by them in connection with all other evidence and should be given such weight as they believe it to be entitled to receive. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, What is the property worth in the open market, viewed with not merely the reference of use to which it is at the time applied? The owner of property is entitled to just compensation for this taking, and just compensation includes all elements of value that are inherent in the property."

Now, if the Court please, in the Baetjer case and in the other case I cited to the Court, the witness is entitled to take these matters into consideration. The weight to be given to his opinion in this case is for the Court to decide, it not being a jury case. But the opinion of the expert when he arrived at the opinion, knowing all the matters involved, considering what a purchaser would consider as between private [1521] parties, is certainly entitled to be in evidence as to the value to be given to that opinion as something to be weighed by the Court, considering all the evidence before it. But

the opinion itself is before this Court and entitled to be received.

The Court: Do you wish to reply?

Mr. Rathbun: I don't think so, your Honor. On his statement he is going to offer further evidence on the lease. We may offer some ourselves when that comes forth.

The Court: Well, then, for the present purposes—

Mr. Rathbun: Pardon me?

The Court: Go ahead.

Mr. Rathbun: We are not bound by the laws of the Territory on the matter of substance. Of course, the Court knows that.

Mr. Vitousek: Well, if the Court please,—

Mr. Rathbun: As far as the evidence here is concerned, our point is on the evidence as it now stands on our motion, and there is no evidence here that I have heard that anybody went into possession, if it was material even, or that they paid any rent on it, or that there was a renewal or that they paid any rent on it. That's all we have to say.

The Court: Well, I think the best thing to do for the present purposes is to overrule the motion and give you an exception. And when the matter comes up again you can present additional arguments. So I will overrule it and give you an [1522] exception on each of the grounds stated.

Mr. Vitousek: If the Court please, the last witness wants to leave for the mainland, having other engagements, and we have no further need to recall him. I just wanted to ask the Government at this time because he proposes to go out on tonight's

plane and unless counsel have need to recall him—

Mr. Rathbun: I have no objection. I wish him a very successful and happy trip.

The Court: Very well. That witness is excused, and we now stand in this case adjourned until the 19th.

Mr. Vitousek: That's right.

The Court: On which day at nine o'clock in the morning we will entertain the case further by receiving as witnesses Mr. Crozier and Mr. Austin for a very minor point.

(The Court adjourned at 11:15 a.m.) [1523]

Honolulu, T. H., December 19, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Yes.

Mr. Vitousek: In the last hearing I stated that Mr. Spalding was due and that we'd put on Mr. Austin first, but unfortunately Mr. Spalding was late today and just got in this morning and it was necessary for Mr. Austin to see him. I have another witness here, and with the Court's permission I'd like to put the other witness on and have Mr. Austin after that.

The Court: All right.

Mr. Vitousek: Mr. Crozier.

The Court: I take it that the parties are ready to proceed.

CHARLES CAMPBELL CROZIER,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. What is your full name?

A. Charles Campbell Crozier. [1524]

Q. And are you a resident of Hawaii?

A. I am.

Q. Born and raised in the Territory?

A. I was.

Q. What is your present occupation?

A. My present occupation is Deputy Tax Commissioner of the Territory, specifically in charge of the real and personal property assessments.

Q. You are next in position, then, to the Commissioner, the Tax Commissioner?

A. Also the Assistant Tax Commissioner and act in his absence.

Q. And how long have you held that position?

A. From May, 1932, to June of 1933 I was in what is known as the Tax Board, an investigating board of the Territory, and in July, 1933, I became a Deputy Tax Commissioner, the position I just cited.

Q. And have you served in that position since that date up to the present time? A. I have.

Q. Before you started in the tax work, what work did you do?

A. In 1914 I joined the Guardian Trust Company in its land department and was continually with the Guardian Trust Company, later taken over

(Testimony of C. C. Crozier.)

by the Bishop Trust Company, to [1525] July 1, 1929, with two years out for war, and a member of the A.E.F.; July 1, 1929, to May of 1932 I was in business, in the real estate business in the City of Honolulu.

Q. Are you a member of the Realty Board?

A. I am.

Q. Prior to becoming a Deputy Tax Commissioner, or prior to becoming associated with the Tax Department of the Territory, did you have any occasion to make appraisals or assessments of property?

A. Right from the inception of, in '14, when I joined the Guardian Trust Company, and then, as I said, they were taken over by the Bishop Trust Company in 1920 or '21; and in the land department, why my experience has been around real property in its various ramifications, leasing, selling, mortgaging, and all the matters that pertain to the general real estate business.

Q. Did you, during that early period of time, act as an appraiser? A. I did.

Q. Now, what in general in your work, as you have described your position in the Tax Office, say particularly in connection with real property, as I understood it, what in general is your work?

A. I was somewhat drafted into the present work of real property. Up to 1927 or '28 the Territory had levied about [1526] 80 per cent of its realizations from general property, principally real and personal property, and the big values prior

(Testimony of C. C. Crozier.)

to that time were in our rural and agricultural activities. We then had an enterprise-for-profit theory of determining their tax liability, and that had broken down and the Territory, along with many other communities, found their tax structure and tax realizations in a chaotic condition. The tax investigating board was appointed by the Legislature with full authority to go into the matter of the economics of taxation for this Territory, and one other feature was the idea of doing away with this so-called enterprise-for-profit, that is capitalizing the earnings of the enterprise to arrive at its real and personal property valuation, to put the enterprises back on an ad valorem basis of taxation. And the J. G. staff of the Associates of Oakland were hired to make that survey. The outcome of it all, Mr. Fairchild, professor of Yale University, was the tax economist hired by the Territory.

In '32 we found ourselves in further economic financial distress, and at two special sessions of the Legislature they completely revamped the tax methods of the Territory, and they put all these areas that were on the so-called enterprise-for-profit, that is our sugar and pineapple ranches and other big enterprises, hotels, back on the ad valorem basis, that is, valuing the land and improvements thereon. It was a radical change in this Territory. And that's when I say I was somewhat [1527] drafted into carrying on the so-called Stafford work. Stafford made a survey of the values, starting with Fort Street and going out to the different points

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and complete islands. And the Legislature authorized the new real property law, in which all these properties would be valued on the ad valorem basis, in which case a study was made of all the plantations to arrive at a rate per acre, in cane principally, and to pick up all the improvements which had never been itemized or taxed as improvements in the Territory.

Q. Do you have charge of that work?

A. I did.

Q. And did you make a study of the various plantations in the Territory?

A. I did, along with others that were in the group, so to speak, or in the office. There was Tax Commissioner Waterhouse and the different assessors. But the principal work was done by me and the staff under me.

Q. And did or did not that require a study of the land tenure, that is, the matter in which land is held by these plantations?

A. I—it did. It took many factors. It took the land tenure; that is, the plantations' fee land; many of the lands are owned under undivided interest, the corporation owning certain fractional interest of land and individuals or other corporations or firms or trusts. Then the Territory has some [1528] valuable sugar land, and then we find a great many individuals in the states, and corporations, family holding corporations, owning these lands that were in the sugar enterprise. The study was made from a number of points. One was the sales test, that

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we could gather from different lands. But we found that very few sugar lands had sold. We could capitalize rents derived from these lands. Or you could come back to the so-called productivity theory, that is, you could take a ton of sugar to market, deduct from your ton of sugar the cost of operations, allocate the net profit to landlord and operator, capitalize the landlord's share of the profit back into capital value to arrive at the value per acre or the value of the acreage.

Q. Did that work require a study and knowledge of the improvements used on plantation properties?

A. The improvements were handled a little different. The improvements were handled by a procedure of the law that was written in, and that is, replacement less depreciation; and further, due to obsolescence or age and condition.

Q. Well, you had to know the improvements?

A. That's right. A survey was made of the type of improvement, average cost factors established to set up their replacement; their, in 1933 or '34, replacement cost factors index, and replacement due to age and condition, to find what we call a present value for tax purposes. [1529]

Q. Well, now, is it or is it not true that in the makeup of plantations, that is, its properties, that they have very similar properties?

A. Yes, there are the type of plantations that practically own its land in fee. We have a number of those. We have a number of plantations that are part fee and part leasehold, including the

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Territorial lands. And in a number of cases the plantations will lease the undivided interest not owned by them. Then we have the third type of plantation that is one hundred percent lease, or pretty near that.

Q. Now, you have also irrigated and unirrigated plantations?

A. Then you get to the further type of irrigated and unirrigated plantations.

Q. In regard to the irrigated plantations, do they or do they not have, without going into capacity, similar types of mill, machinery and other equipment?

A. They are similar insofar as the mill is concerned.

Q. And how about irrigation systems?

A. Well, the non-irrigated plantation has very little irrigation systems. You find very little non-irrigation system items, such as ditches and reservoirs and pipe lines and the like; compared to the irrigated system that is considerable; tangible items in the irrigated system.

Q. How about transportations? [1530]

A. Well, transportation is, has been from my experience, has been—has lots of history back of it. In the early days, by reason of ground conditions and topography of different plantations—no two plantations are the same in that condition—we had the days of the bullock followed by railroad transportation, followed by the vehicle, of the truck, and it's been a cycle within itself.